TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 116.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, AND CHARLES DUNCAN, TRUSTEE, PETITIONERS,

vs.

CHARLES H. GREEN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1905.
CERTIORARI AND RETURN FILED NOVEMBER 3, 1905.

(19,902.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1906.

a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of INGALLS BROTHERS, Bankrupts; CHARLES H. GREEN ET AL., Appellants.

Transcript of Record.

Appeal from the District Court of the United States for the Northern District of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Sep. 16, 1904. William Parkin, clerk.

1 District Court of the United States, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

I, Edwin A. King, Referee in this matter, upon the petition of J. B. Orcutt Company; Charles Duncan and Charles H. Dauchy Company, for leave to file proofs of claims, &c., which petitions were presented to me April 2, 1904, and upon the evidence taken before me, do find the following

Facts.

1st. That adjudication was had herein December 3, 1902.

2d. That April 1, 1903, J. B. Orcutt Company duly verified a proof of claim against the bankrupts for $893.68, and delivered the same shortly thereafter to Charles Duncan, the trustee.

3d. That on December 19, 1902, Charles Duncan duly verified a proof of claim against the bankrupts for $4,171, setting out an offset of $327.

2 4. That at the first meeting of creditors Charles H. Dauchy Company presented to the Referee a defective proof of claim against said bankrupts for $3,535.67, which was returned by the Referee to the said company for correction.

5th. That prior to January 23, 1903, said Dauchy Company duly verified another proof of claim, in the same amount, prepared by Henry W. Smith, who had volunteered to prepare the same so as to comply with the rules; and on or about March 15, 1903, the said Dauchy Company delivered the same to Charles Duncan, the trustee.

6th. That the said trustee, prior to June 1, 1903, delivered all three of said proofs of claim to Henry W. Smith, the attorney for said trustee, with directions to file the same with the Referee.

7th. That said Henry W. Smith, such attorney, received said

proofs of claim and promised to file them with the Referee, but failed to do so.

8th. That the defective Dauchy Company claim first presented and returned as aforesaid is not now to be found, and nothing appears of record in reference thereto prior to this application.

9th. That the claims filed herein prior to December 3, 1903, aggregate about $10,000, and that the estate is not large enough to pay them in full.

10th. That said Henry W. Smith for a time after said claims were so left him for filing by the trustee upon his own responsibility delayed filing the same with the Referee. That on the occasion when he received them he handed them to a clerk in his office, directing him to put them with the papers in this proceeding. That shortly thereafter he told said clerk to file said proofs of claim with
3 the Referee. That subsequently he asked said clerk if he had filed them, and he said he had not; and he then directed said clerk a second time to file them immediately, and the clerk said he would do so. That this was before the expiration of a year after adjudication. That the Dauchy proof so left with said Smith is lost and cannot now be found. That said Smith has made diligent search for it in his office. That he found the Orcutt and Duncan proofs of claim in a package of papers relating to another bankruptcy proceeding; and that his office was upset for a considerable time during the year by reason of repairs being made thereto. That another proof of claim, for the same amount, was duly verified by the Dauchy Company April 2, 1904; and with the Duncan and Orcutt proofs was presented to the Referee for filing, each said proof being accompanied by a petition, dated and filed April 2, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3, 1903, or for such other or further relief as may be just and proper.

11th. That said Henry W. Smith was not the attorney for any of said claimants, and none of them instructed him to withhold their claims from filing, or knew of any intention on his part of so withholding them, or knew that he had failed to file them until more than a year after said adjudication.

12th. That upon the presentation of these petitions, Charles H. Green, Fullerton-Powell Hard Wood Lumber Company, and others, creditors of said bankrupts, objected to the granting of the relief asked in the said several petitions filed April 2, 1904, upon the ground that the proofs of claim have not been seasonably presented to the Court, and are barred by the provisions of Section 57*n* of the Bankruptcy Act.

4 13th. That the trustee has been requested to object to the granting of the relief asked by the petitioners, and has declined so to do upon the ground that he thinks the proofs of claim are legally entitled to be filed.

And I find as conclusions of law:

First.—That by reason of the expiration of more than one year subsequent to the adjudication herein and prior to the filing of said several petitions and the presentation therewith to the Referee of said

several proofs of claim therein referred to, for the purpose of having said proofs of claim filed, neither of said petitioners is entitled to have his respective claim filed.

Second.—That by reason of the expiration of more than one year subsequent to adjudication herein and prior to the filing of said several petitions and the presentation therewith to the Referee of said several proofs of claim therein referred to, for the purpose of having said proofs of claim filed, neither the Referee nor the Court has any discretionary power to permit either of said proofs of claim to be filed, either *nunc pro tunc* or otherwise.

Third.—That the prayer of each of said respective petitions must be denied.

EDWIN A. KING, *Referee.*

(Endorsed:)—Findings and decision of Referee refusing to allow the filing of claims *nunc pro tunc*.—Filed April 22, 1904, 10 a. m.—Edwin A. King, Referee, &c.

5 At a Term of the District Court of the United States, held in and for the Northern District of New York, at the Chambers of the Referee, Troy, N. Y., on the 22d day of April, 1904.

Present: Hon. Edwin A. King, Referee.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

J. B. Orcutt Company, Charles Dauchy Company and Charles Duncan, having heretofore and on April 2, 1904, presented their respective petitions asking leave to file their proofs of claim with the Referee *nunc pro tunc* as of a date prior to December 3, 1902; and said respective petitions having been so amended as to ask for such other and further relief in the premises as may be proper, and the said petitioners having appeared, J. B. Orcutt Company and Charles Duncan by William W. Morrill, their attorney, and Charles Dauchy Company by Thomas O'Connor, its attorney, on behalf of the prayer of said petitions, and Charles H. Green, a creditor, having appeared by H. D. Bailey, his attorney, and Fullerton-Powell Hard Wood Lumber Company, a creditor, having appeared by Frank H. Deal, its attorney, in opposition to the granting of the prayer of said petitions; and the trustee having appeared by Henry W. Smith, his attorney, and submitted arguments in support of said petitions; and the Court having heard the evidence submitted and made thereon its findings of fact and conclusions of law, now, pursuant thereto,

Ordered, that the prayer of the said petitions for leave to file
6 said proofs of claim *nunc pro tunc*, and for other relief in the premises, be, and each of them is, hereby denied.

EDWIN A. KING, *Referee.*

(Endorsed:)—Order denying applications of J. B. Orcutt Company *et al.*—Filed April 22, 1904, 12 m.—Edwin A. King, Referee, &c.

In the District Court of the United States for the Northern District of New York.

In the Matter of ARTHUR S. INGALLS and HOWARD R. INGALLS, as Individuals and as Copartners of the Firm of Ingalls Brothers, Bankrupts.

In Bankruptcy. No. 1249.

To Hon. John R. Hazel, acting Judge:

I, Edwin A. King, Referee herein, hereby certify for review three questions which have arisen before and been decided by me herein, viz.:

1. Does Section 57*n*, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI. (1), or otherwise, under the circumstances of this case, to permit
7 a proof of claim to be filed with me subsequent to one year after adjudication, *nunc pro tunc*, as of a date within said year.

3. Should the relief asked by the petitioners have been granted?

Annexed hereto are my findings of fact, which comprise a summary of the evidence relating to the questions presented, my conclusions of law thereon, the order made by me thereon, and the petitions for review.

Dated Troy, N. Y., May 2, 1904.

EDWIN A. KING, *Referee.*

(Endorsement on cover:)—Certificate on Review.—Filed June 28, 1904.—W. S. Doolittle, Clerk.

Upon the authority of the decision of Judge Adams *In re* Seff, in the Southern District, a certified copy of the record being filed on this hearing, the claim of petitioning creditors will be filed as of the date when delivered to the trustee. The equities are certainly with the creditor, and if possible his contention should be maintained. Moreover, the decision of Judge Adams seems to place a broad construction upon the requirements of General Orders 20 and 21. General Order 21 prescribes the duty of the trustee as to claims filed with him. This implies the propriety of such a filing. The claim having been thus filed the one year limitation has not expired.

The case is returned to the Referee with instructions to file the claims.

(Endorsed:)—Memo. Hazel, *J.*, endorsed on opinion of Referee.

8 In the District Court of the United States for the Northern District of New York.

In the Matter of WILBUR S. INGALLS and HOWARD S. INGALLS, as Individuals and as Copartners of the Firm of Ingalls Brothers, Bankrupts.

In Bankruptcy. No. 1249.

On reading and filing the petitions of Charles H. Dauchy Company, J. B. Orcutt Company and Charles Duncan, dated April 27, 1904, asking a review of an order made by Edwin A. King, Esq., Referee in Bankruptcy, to whom the above entitled matter was referred, and the question relating to the filing of the proofs of claim of the above named petitioners having been certified to the District Judge for his decision thereon by the said Referee, together with a summary of the evidence relating thereto, and the finding and order of the Referee thereon;

Now, on motion of William W. Morrill and Thomas O'Connor, attorneys for said petitioners, after hearing H. D. Bailey and Frank H. Deal, attorneys for certain creditors, in opposition, and having also been attended by H. W. Smith, Esq., attorney for the trustee, it is

Ordered, that the proofs of claim of said several petitioners be received and filed by the said Referee.

Dated June 27, 1904.

JOHN R. HAZEL, *U. S. J.*

(Endorsed:)—Order.—Filed June 28, 1904.—W. S. Doolittle, Clerk.

9 In the United States District Court Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankrupty. No. 1249.

Charles H. Green, one of the creditors of said bankrupts, conceiving himself aggrieved by the order entered herein June 28, 1904, which reverses the determination made by the Referee herein, in reference to the filing *nunc pro tunc* of certain claims of J. B. Orcutt Company, Charles H. Dauchy Company, and Charles Duncan, does hereby appeal from so much of said order as reverses the determination made by the Referee and as answers the questions certified by the Referee, and from said order as a whole, to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that, in view of the position of the trustee and his refusal to act, as shown by request and

refusal herewith filed, the said Green may be permitted to prosecute such appeal and that the transcript of the record, proceedings and papers upon which said order entered June 28, 1904, was made, including the petitions for review filed by J. B. Orcutt Company, Charles H. Dauchy Company and Charles Duncan, the certificate of the Referee, the findings and determination of the Referee and the order thereon duly authenticated, may be sent to the
10 United States Circuit Court of Appeals for the Second Circuit.

H. D. BAILEY,
Attorney for Charles H. Green, Nos. 1 and 2
Keenan Building, Troy, N. Y.

The foregoing claim of appeal is allowed.
Dated July 2, 1904.

JOHN R. HAZEL,
United States District Judge.

(Endorsed:)—Petition for Appeal.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

THE UNITED STATES OF AMERICA, *ss:*

To J. B. Orcutt Company, Charles H. Dauchy Company and Charles Duncan, Greeting:

Whereas, Charles H. Green has lately appealed to the United States Circuit Court of Appeals for the Second Circuit from the order rendered in the District Court of the United States for the Northern District of New York, entered June 28, 1904, and entered in the Clerk's office of said court, and has filed the security required by law, you are hereby cited to appear before said United States Circuit Court of Appeals for the Second Circuit, at the City of New York, on the 30th day of July, 1904, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, in the Second Circuit Court, this 2d day of July, 1904.

JOHN R. HAZEL,
United States District Judge.

(Endorsed:)—In Bankruptcy, No. 1249.—In the United States District Court.—Northern District of New York.—In the Matter of Ingalls Brothers, Bankrupts.—Citation on Appeal.—H. D.
11 Bailey, Att'y for Charles H. Green, Nos. 1 & 2 Keenan Building, Troy, N. Y.—U. S. District Court, N. D. of N. Y.—Filed July 6, 1904, at — o'clock m.—W. S. Doolittle, Clerk.

In the District Court of the United States, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankrupty. No. 1249.

To Charles Duncan, Trustee.

SIR: I am a creditor of the bankrupts with an allowed claim. I am aggrieved at the decision rendered in this court by Hon. John R. Hazel, Judge, at a term held June 14, 1904, and at the order entered thereon, allowing the filing of claims of J. B. Orcutt Company, Charles Dauchy Company and Charles Duncan, as the result of such order will diminish my dividend by about one-half. I desire that an appeal be taken from and application duly made for revision in matters of law of the said decision of June 14, 1904, and the order entered thereon to and by the Circuit Court of Appeals of the United States for the Second Circuit. I will pay all expenses incident thereto. Will you, as trustee, take such appeal and apply for such revision?

C. H. GREEN, *Creditor,*
By H. D. BAILEY,
His Attorney.

12 To C. H. Green.

SIR: I decline to take the appeal and to apply for a revision as requested by you above.

CHARLES DUNCAN, *Trustee.*

(Endorsed:)—Request of Trustee to appeal and his refusal.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

(Endorsed:)—In the District Court of the United States, Northern District of New York.—In Bankruptcy, No. 1249.—In the Matter of Ingalls Brothers, Bankrupts.—Copy Request of Trustee to appeal and his refusal.—H. D. Bailey, Att'y for C. H. Green, Nos. 1 and 2 Keenan Building, Troy, N. Y.

In the United States District Court, Northern District of New York.

In Bankrupty. No. 1249.

In the Matter of INGALLS BROTHERS, Bankrupts.

Petition for Review.

To the Honorables the Justices of the Circuit Court of Appeals for the Second Circuit of the United States.

To Hon. John R. Hazel, Acting District Judge of the Northern District of New York.

The petition of Charles H. Green, respectfully shows: Your petitioner resides in Troy, N. Y., and is a creditor of said bank-
13 rupts, having a claim, which has been duly allowed herein. Said bankrupts were so adjudicated December 3, 1902. On or about April 1, 1904, J. B. Orcutt Company, Charles H. Dauchy Company and Charles Duncan presented to the Hon. Edwin A. King, Referee in Bankruptcy, to whom this matter had been referred, claims aggregating upwards of $7,000, with petitions for leave to have those claims filed *nunc pro tunc* as of a date prior to December 3, 1903. The total amount of claims allowed herein is about $10,000. The assets are not sufficient to pay in full the allowed claims. As the filing *nunc pro tunc* of the above mentioned claims would reduce your petitioner's dividend by nearly one-half, he, in conjunction with other creditors, opposed the application, and the same was denied by the Referee, who, upon the petition of the claimant, certified three questions to the Judge of the Northern District of New York for review, which questions were as follows:

1. Does Section 57*n*, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI. (1), or otherwise, under the circumstances of this case, to permit a proof of claim to be filed with me subsequent to one year after adjudication *nunc pro tunc* as of a date within said year?

3. Should the relief asked by the petitioners have been granted?

And returned therewith his findings of fact, to which no exceptions were taken. The matter was heard by the District Judge on June 14, 1904, and an order made reversing the decision of the Referee. A copy of that order, entered June 28, 1904, is hereto annexed.

14 Your petitioner avers, upon his information and belief, that said order was erroneous in matter of law, in so far as it reverses the decision of the Referee, and in so far as it permits the filing of the claims above mentioned after the expiration of the one year from adjudication, and erroneous in the answer given to each of the questions certified by the Referee for the reasons particularly set forth in the assignment of errors filed by your petitioner, to which reference is hereby made.

Your petitioner further shows that Charles Duncan is trustee herein; that your petitioner has duly requested him to appeal from said order entered June 28, 1904, and to apply for a revision of the same, which the said trustee has declined to do, as more fully appears from the request and answer thereto hereto annexed; that your petitioner's rights are invaded and his dividend materially decreased by the order complained of.

Wherefore, your petitioner, feeling aggrieved because of said order, asks that the same may be reviewed in matter of law by your Honorable Court, as provided in Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the statutes, rules and practice in such case provided, and that your petitioner may be permitted to prosecute such application for revision.

CHARLES H. GREEN, *Petitioner,*
By H. D. BAILEY, *His Att'y.*

STATE OF NEW YORK, *Rensselaer County, ss:*

I. H. D. Bailey, attorney for the petitioner named above, do make solemn oath, that the statements of fact contained in the foregoing petition are true to the best of my knowledge, information and
15 belief. The reason why this verification is not made by the petitioner is that he is now absent out of the State.

H. D. BAILEY.

Sworn to before me, July 1, 1904.
[L. S.] MICHAEL F. O'CONNOR,
Notary Public, Rensselaer County, N. Y.

(Endorsed:)—Petition for Revision.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

In the Circuit Court of Appeals for the Second Circuit.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

Whereas, application has been made by Charles H. Green for revision in matter of law by this Court of the order made by the District Judge of the United States, Northern District of New York, entered June 28, 1904; and

Whereas, it appears that the case is one wherein revision may properly be asked, as provided in Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the statutes and practice in such case made and provided; and

Whereas, a bond in the sum of $500 has been given by said Green and duly approved; now, on motion of H. D. Bailey, attorney for the petitioner Green, it is ordered that the said Charles H.
16 Green be permitted to prosecute such application for revision in his own name, in default of such action by the trustee

herein, and that the said order of the District Court, entered June 28, 1904, be revised in matter of law by the Circuit Court of Appeals, for the Second Circuit, as provided by Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the rules and practice of the Court.

Given under my hand in the Second Circuit Court this 2d day of July, 1904.

JOHN R. HAZEL,
United States District Judge.

(Endorsed:)—Order for Revision.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

In the United States District Court, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

To the Honorables, Justices of the Circuit Court of Appeals for the Second Circuit of the United States.

To Hon. John R. Hazel, Acting District Judge of the Northern District of New York:

The petition of Fullerton-Powell Hardwood Lumber Company respectfully shows: That your petitioner is a creditor of said bankrupts, having a claim, which has been duly allowed. That
17 said bankrupts were so adjudicated December 3, 1902. That on or about April 1, 1904, J. B. Orcutt Company, Charles H. Green Company and Charles Duncan made application to the Referee herein for leave to file with him claims against said bankrupts amounting to upwards of $7,000 *nunc pro tunc*, as of a date prior to December 3, 1903. That said Referee denied such application. The matter was then taken by review to the District Judge, who, on June 27, 1904, made an order entered June 28, 1904, granting such application and directing the filing of claims.

That your petitioner is aggrieved by said order entered June 28, 1904. That, as it is advised and believes, said order was erroneous in matter of law in the following respects:

1st. In that it reverses the decision of the Referee.

2d. In that it permits the claims to be received and filed, after the expiration of one year from the date of adjudication.

3d. In that it does not answer the first question certified by the Referee, "Yes."

4th. In that it does not answer the second question certified by the Referee, "No."

5th. In that it does not answer the third question certified by the Referee, "No."

That your petitioner is interested, in that if the order entered June 28, 1904, herein be permitted to stand, its dividend herein will be decreased nearly one-half.

Wherefore, your petitioner asks, that the said order entered June 28, 1904, herein may be reviewed in matter of law by your Honorable Court, as provided in Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the statutes, rules and practice in such case provided.

FULLERTON-POWELL HARDWOOD LUMBER COMPANY, *Petitioner,*
By FRANK H. DEAL, *Its Attorney.*

18 STATE OF NEW YORK, *Rensselaer County, ss:*

I, Frank H. Deal, attorney for the petitioner named above, do make solemn oath, that the statements contained in the foregoing petition are true to the best of my knowledge, information and belief. The reason why this verification is not made by the petitioner is, that it is a corporation; that none of its officers are now within this district.

FRANK H. DEAL.

Sworn to before me July 5, 1904.
[L. S.] MICHAEL F. O'CONNOR,
Notary Public, Rensselaer County, N. Y.

(Endorsed:)—Petition for Reissue and Assignment of Errors.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

In the United States District Court, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

Now comes Charles H. Green, by H. D. Bailey, his attorney and solicitor, and says, that the order made in this matter, entered July 28, 1904, reversing the decision of the Referee and allowing the filing of the claims of J. B. Orcutt Company, Charles Dauchy Company and Charles Duncan, is erroneous in matter of law and
19 against the rights of said Green and of other creditors, for the following reasons:

1st. These claims not having been presented to and filed with the Referee within one year after adjudication, their subsequent presentation and filing with the Referee is barred and forbidden by the provisions of Sec. 57*n* of the Bankruptcy Act.

2d. To the first question certified by the Referee the answer should have been "yes" and not "no."

3d. To the second question certified by the Referee the answer should have been "no" and not "yes."

4th. To the third question certified by the Referee the answer should have been "no" and not "yes."

5th. The claims should not be allowed to be filed, inasmuch as more than one year had elapsed since the adjudication, and there

was neither power nor discretion in the Court to allow the filing, and General Order 21 (1) imposes no duty upon the trustee.

Wherefore, the said Green prays that the order entered June 28, 1904, in so far as the same reverses the decision of the Referee, and in so far as it allows the claims above mentioned to be filed, may be revised, reversed, vacated and set aside, and that the Court may be directed to enter a decree accordingly.

H. D. BAILEY,
Attorney for Charles H. Green, Nos. 1 and 2
Keenan Building, Troy, N. Y.

(Endorsed:)—Assignment of Errors.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

20 In the United States District Court, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

Stipulated, that the foregoing papers, to wit:

1. Findings of fact and conclusions of law by Referee;
2. Order made by Referee, April 22, 1904;
3. Petition for review by claimants, printing waived;
4. Certificate of Referee, dated May 2, 1904;
5. Memorandum decision of Judge Hazel;
6. Order made by Judge Hazel June 27, 1904, entered June 28, 1904;
7. Notice of appeal and citation thereon;
8. Petition for review by Green, request upon trustee and his reply and order thereon;
9. Petition for review by Fullerton-Powell Hardwood Lumber Co.;
10. Assignment of errors,

shall constitute the record herein in the Circuit Court of Appeals. That the foregoing are correct transcripts of the whole of said originals, and that the questions of law to be passed upon are those certified by the Referee, and those determined in the order of
21 Judge Hazel. Clerk's certificate is dispensed with. Service of papers and citation waived.

Dated July 6, 1904.

WILLIAM W. MORRILL,
Att'y for J. B. Orcutt Co. and Charles Duncan, Appellees.
THOS. O'CONNOR,
Att'y for Charles H. Dauchy Co., Appellee.
HENRY W. SMITH,
Att'y for Trustee, Appellee.
FRANK H. DEAL,
Att'y for Fullerton-Powell Hardwood Lumber Co., Appellant.
H. D. BAILEY,
Att'y for C. H. Green, Appellant.

(Endorsed:)—Stipulation.—Filed July 26th, 1904.—W. S. Doolittle, Clerk.

(Endorsed:)—United States Circuit Court of Appeals for the Second Circuit.—In the Matter of Ingalls Brothers, Bankrupts.—Papers on Review of Order allowing Claims to be filed *nunc pro tunc*.—H. D. Bailey, Nos. 1 & 2 Keenan Building, Troy, N. Y.; Frank H. Deal, 249 River Street, Troy, N. Y., Attorneys for Appellants.

UNITED STATES OF AMERICA, *Northern District of New York, ss:*

I, William S. Doolittle, Clerk of the District Court of the United States of America for the Northern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 19, inclusive, contain true and complete copies of the following papers on file in my said office in the matter of Ingalls Brothers, Bankrupts, and stipulated to contain the papers to
22 review the order of said Court directing the Referee to file claims, to wit: Findings and decision of Referee refusing to allow the filing of claims *nunc pro tunc*, order of Referee denying application of J. B. Orcutt Company *et al.*, certificate of Referee for review, Memo., Hazel, *J.*, order allowing proofs of claims to be filed, petition for appeal, citation (original), requests of trustee to appeal and his refusal, petition of Charles H. Green for revision, order for revision, petition of Fullerton-Powell Hardwood Lumber Company for revision and assignment of errors, assignment of errors of Charles H. Green, and stipulation as to transcript of record.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Utica, in the Northern District of New York, in the Second Circuit, this twenty-ninth day of July, in the year of our Lord, one thousand nine hundred and four, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] W. S. DOOLITTLE, *Clerk*,
By C. W. HIGGISON, *Deputy*.

23 United States Circuit Court of Appeals for the Second Circuit.

No. 121. October Term, 1904.

Submitted January 19, 1905; Decided March 1, 1905.

In the Matter of INGALLS BROTHERS, Bankrupts; CHARLES H. GREEN ET AL., Appellants.

Appeal from the District Court of the United States for the Northern District of New York.

Before Judges Wallace, Lacombe, and Coxe.

This cause comes here upon appeal from an order of the District Court, Northern District of New York, providing that the claims of

three creditors of the bankrupt, one of whom is also the trustee, be received and filed by the Referee—although they had not been presented to him within one year after adjudication.

Per Curiam.—The referee rejected the claims, but the District Judge reversed his ruling, evidently in order to conform the practice in the Northern District to that followed in the Southern District *in re Seff* (unreported). The opinion of the referee sets forth the facts and contains a very full discussion of the questions of law involved and we concur in his interpretation of the statute and in his conclusions. His opinion is not reported, but it may be printed as a supplement to this memorandum.

The order of the District Court is reversed.

Submitted without argument.

24 In the District Court of the United States for the Northern District of New York.

In the Matter of WILBUR S. INGALLS and HOWARD R. INGALLS, as Individuals and as Co-partners of the Firm of Ingalls Brothers, Bankrupts.

In Bankruptcy. No. 1249.

Applications for Leave to File Proofs of Claim.

William W. Morrill, for J. B. Orcutt Company and Charles Duncan.

Thomas O'Connor, for C. H. Dauchy Company.

H. W Smith, for Trustee

H. D. Bailey, Frank H. Deal, for objecting creditors.

KING, Referee:—Three alleged creditors herein have filed petitions asking leave to file proofs of claims not filed within a year after adjudication. Within that year J. B. Orcutt Company verified a proof for $893.68; C. H. Dauchy Company, a proof for $3,535.67; Charles Duncan, a proof for $3,844. The Orcutt and Dauchy proofs were duly received by said Duncan, who is the trustee herein, for the purpose of being filed with the referee, and, together with his personal proof, were handed to his official attorney with instructions to file all three proofs. The attorney instructed his clerk to file them, but the clerk neglected to do so. Certain creditors have objected to their being now filed.

25 The question for determination is whether, as matter either of right or of discretion, these proofs can now be filed. The earnestness and ability of counsel have left little to be said, and no attempt will be made to follow out all the various lines of argument suggested; but it seems desirable to indicate something of the considerations involved in the decision reached.

The petitioners assert two things, viz.:

(1.) That neither Section 57*n* nor any other provision of the bankrupt act limits the filing of a proof of claim to a year or any particular time after adjudication; and

(2.) That if this be be not true, then the last sentence of G. O. XXI (1) operates to confer jurisdiction, under the circumstances of this case, to permit filing after the expiration of a year *nunc pro tunc* as of a date within the year.

Briefly stated, the argument for the first proposition is that Section 57*a* defines a proof of claim as "a statement under oath, in writing, signed by a creditor, setting forth the claim," etc.; that subs. *e* provides that "Claims after being proved may, for the purpose of allowance, be filed by the claimants—before the referee;" that subs. *d* provides that "Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court (referee)," etc.; that subs. *n* provides that "Claims shall not be proved against a bankrupt estate subsequent to one year after adjudication," that a "proof" is a claim "proved;" that the word "proved" must be assumed to have been employed in but a single sense and with a single meaning in the same section, and was not designated and cannot be construed to have in subs. *n* any larger meaning than in *a*, *e* or *d*, in short, that no logical or necessary construction of subs. *n* imposes any limitation upon the time of filing, but the contrary; and, finally, applying the section to the facts of this case, that the three claims in issue, having been "proved" within the year, may be filed at any time.

26 As a matter of first impression, the construction urged seems almost conclusively reasonable. Pursued further, however, the proposition is perhaps reduced to the absurd, when it is seen that the prohibition against "proving" in its literal effect would not prohibit—would simply forbid an act which *per se* would be not only utterly harmless but utterly foolish, unless logically related to some further act designated to render it effective. If "proved" in subs. *n* is the mere equivalent of "proof" in subs. *a* and "proved" in subs. *e* and *d*, there seems to be nothing better than some purely speculative reason for subs. *n*, since practically the time of verification can make no possible difference to parties in interest except as involved in the time of filing. "Proof" under subs. *a* involves nobody save the creditor himself; filing—"proved"—under subs. *n* involves notice to all parties in interest. That the presumably logical and consistent use of language is opposed by the practically illogical and inconsistent consequences involved seems to have been the decision or assumption of every court before which the interpretation of subs. *n* has arisen, although most of the decisions are somewhat general, rather than specific, and none of them specifically appears to have been predicated upon the precise state of facts disclosed here, *i. e.*, upon proofs verified within the year but offered for filing thereafter, which squarely raises the question of construction. However, their purpose cannot be doubted, and, being unbroken in point of their conclusion, they

must be accepted as conclusive against the petitioners. Stated in the order in which they are reported, they are:

Re Stein (1 Am. B. R. 662).
Bray *v.* Cobb (3 *id.* 788).
Re Shaffer (4 *id.* 728).
Re Rhodes (*id.* 197).
Re Liebowitz (6 *ib.* 268).
Hutchinson *v.* Otis (8 *id.* 382; s. c. on appeal, 10 *id.* 135).
Re Towne (8 *id.* 284).
Re Moebius (8 *id.* 590).
27 *Re* Bimberg (9 *id.* 601).
Re Prindle Pump Co. (10 *id.* 405).
Re Thompson's Sons (10 *id.* 581).
Re Brown (10 *id.* 588).
Re Long (11 *id.* 136).

See also, *in re* Stover (11 *id.* 345). The conclusion that subs. *n* relates to filing is categorically stated in Collier 4th ed. 394.

I hold that no statutory right to file a proof of claim subsequent to the expiration of a year after adjudication exists.

This leads to the second proposition at issue, which is most strenuously urged.

Irrespective of statutory powers, courts always possess the inherent power to be just in their direct dealings with persons subject to their jurisdiction and orders, and in case of fraud (*Re* Wolff, 4 Am. B. R. 74; *Re* Towne, *supra*). It is unnecessary to pursue the refinements of this subject; it is necessary to admit that the arguments advanced in support of the issue appeal very strongly to the sense of justice The issue itself presents a radical problem, turning upon the effect attributable to the final sentence of General Order XXI (1).

The bankruptcy act, Section 30, provides: "All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Pursuant thereto, that court prescribed G. O. XXI (1), which, by its final sentence, provides: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred." The act, Section 47, prescribes, and G. O. XVII relates to, duties of trustees, but no such duty is among them. The subject of proofs of claim is covered by Section 57.

The act of 1867, Section 10, provided: "That the justices of the Supreme Court, subject to the provisions of this act, shall frame general orders for the following purposes: For regulating the
28 duties of the several officers of said courts." Section 22 provided: "If the proof is satisfactory to the register (referee)—it shall be delivered or sent by mail to the assignee (trustee) who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of the creditors who have proved their claims—which books shall be open to the inspection of all the creditors." To regulate this duty G. O. XXXIV provided: "Proofs of

debt received by any assignee shall be delivered to the register to whom the case is referred." Thus it appears that this general order was strictly within Section 10 operating upon Section 22.

Under the act of 1898, G. O. XXXIV, just mentioned, became the basis of G. O. XXI, but so carelessly were the changes made that, although "trustee" replaced "assignee" and "referee" replaced "register," "claim" did not replace "debt," and apparently no comparison of the two acts and study of the old General Orders, sufficient to produce harmonious results, was made. The same criticism applies equally to various other General Orders.

The point sought to be emphasized is the necessary connection between the act of 1867 and its provisions just considered contained in G. O. XXXIV as contrasted with the entire lack of connection between the act of 1898 and its similar provisions in G. O. XXI (1), which has no reason to be.

Does Section 30 of the present act, already quoted, contemplate any enlargement of the rights or duties of any person prescribed by the act? Undeniably the General Orders are treated in practice as essential upon the subjects to which they relate. This very General Order XXI (1) is inevitably effective in its requirements preceding the sentence in question, as has been held whenever it was considered. It is claimed upon behalf of the trustee herein that the General Orders possess the force of law. That proposition, if conceded, would permit them to be inconsistent with the statute of which they are the creatures and to modify or enlarge it. Even though controlling, so far as not inconsistent with the act, certainly they must yield
29 to the act and cannot operate to prevent or alter its operation.

Perhaps unwilling recognition of this conclusion induces the further contention of the trustee that a decision of the question whether Section 57*n* limits the time within which proofs can be filed is unnecessary to the determination of the question whether, in view of the special sentence in General Order XXI (1), the court possesses power to permit the filing *nunc pro tunc* of the proofs in issue. This contention seems wholly untenable.

The authorities hereinbefore cited do or do not correctly declare the meaning of Section 57*n*. If they do correctly declare it, the Supreme Court is powerless to vary it. The Sentence of General Order XXI (1) in issue either does or does not impose a duty. If it does impose a duty, clearly the trustee is at fault and the remedy of the petitioners is upon his bond, which was given expressly to secure the faithful discharge of his duties, rather than in the favorable discretion of the court. If it does not impose a duty, equally clearly creditors cannot rely upon it, since they were not justified in depending upon mere volunteer action. It is urged that its existence is a perpetual snare and menace to creditors, and so puts the court in the position of doing injustice which good conscience requires it to rectify and which it has inherent power to rectify. Its existence is certainly unfortunate, and particularly to the petitioners, if their present plight be attributable to it. That, however, seems not to be at all the case, the proximate cause being mere carelessness, altogether not imputable to them. But to hold it a perpetual snare, in

the sense and with the effect claimed, would be to hold it *per se* a perpetual abrogation of Section 57*n*, entitling any tardy creditor at any time, and all tardy creditors at all times, to avoid the limitation, even to the point of fraud and injustice. Thus Section 57*n* is inevitably involved in any decision of the right to exercise discretion.

Discretion depends upon particular facts, not upon fixed general conditions. Compulsory discretion would be no discretion.

30 To recognize the mere existence of this obnoxious sentence as a sufficient basis for the exercise of discretion in the case at bar would be to compel the same action in every case and so to nullify Section 57*n*. In the case at bar, no particular facts appear to specialize it and so call for or justify the exercise of any discretion—such as a direct act of the court, which the court could readily see had produced damage. It was not misapprehension, but was carelessness, which produced the trouble. If Section 57*n* creates no limitation upon filing, no discretion need be invoked; if it creates the limitation declared by the authorities cited, no discretion can be exercised, even though invoked, merely in consequence of the existence of the obnoxious provision of G. O. XXI (1) or upon the facts of this case. Wait *v.* Van Allen (22 N. Y., 319); People *v.* Security Co. (79 N. Y., 267); McQuigan *v.* R. R. Co. (129 N. Y., 50, 55).

In reaching this conclusion, it has become logically necessary to disregard *In Re Seff*, the only decision urged as direct authority for the position of the petitioners. The papers therein have been treated as properly authenticated. Considerable might be said about them, but if the conclusions reached herein are correct, the Seff order is erroneous from whatever standpoint viewed, whether based upon the mere existence of the provisions of General Order XXI (1), or upon the exercise of discretion.

Careful consideration has been given to all the arguments submitted, but for the reasons stated I believe I am powerless to allow the proofs of claim in issue to be filed, and I so decide.

An order may be entered accordingly.

31 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 13th day of March, one thousand nine hundred and five.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of INGALLS BROTHERS, Bankrupts; CHARLES H. GREEN ET AL., Appellants.

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. J. W.
E. H. L.
A. C. C.

32 Endorsed: United States Circuit Court of Appeals, Second Circuit *In re* Ingalls Bros. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 13, 1905. William Parkin, Clerk.

33 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 32 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Ingalls Brothers, Bankrupts, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of June, in the year of our Lord One Thousand Nine Hundred and Five and of the Independence of the said United States the One Hundred and Twenty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

34 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Charles H. Green *et al.*, are appellants, and J. B. Orcutt Company, Charles Duncan *et al.*, are appellees In the Matter of Ingalls Brothers, Bankrupts, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of New York, and, we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States.

35 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceed-

ings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

36 [Endorsed:] File No. 19,902. Supreme Court of the United States. No. 400, October Term, 1905. J. B. Orcutt Company *et al. vs.* Charles H. Green *et al.* Writ of Certiorari.

37 In the United States Circuit Court of Appeals for the Second Circuit.

No. —.

CHARLES H. GREEN and the FULLERTON-POWELL HARD WOOD LUMBER COMPANY ET AL., Appellants,

vs.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, and CHARLES DUNCAN, Trustee in the Matter of Ingalls Bros., Bankrupts.

Whereas the petition of the respondents in the above entitled cause for the writ of certiorari to the Supreme Court of the United States was granted by the said Court on the twenty-fourth day of October, 1905, and whereas a certified copy of the transcript of the record in the above entitled cause accompanied the said petition and is now on file in that Court;

Now it is by counsel of the respective parties hereby stipulated and agreed that the certified transcript of the record in the above entitled cause now on file in the said Supreme Court shall be taken and considered as a return of the Clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari aforesaid.

H. D. BAILEY,
Counsel for Charles H. Green.
FRANK H. DEAL,
Counsel for Fullerton-Powell Hardware Lumber Co.
WILLIAM W. MORRILL,
Counsel for J. B. Orcutt Co. and Charles Duncan.
THOS. O'CONNOR,
Counsel for Charles H. Dauchy Co.
HENRY W. SMITH,
Counsel for Trustee.

38 (Endorsed:) *In re* Ingalls. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 31, 1905. William Parkin, Clerk.

39 To the Honorable the Supreme Court of the United States:

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as a return to the writ of certiorari issued herein.

Dated, New York, October 31st, 1905.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

40 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Ingalls Bros. Return to Writ of Certiorari.

[Endorsed:] File No. 19,902. Supreme Court U. S., October Term, 1905. Term No. 400. J. B. Orcutt & Co. *et al. vs.* Chas. H. Green *et al.* Writ of Certiorari and return. Filed Nov. 3rd, 1905.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

Office Supreme Court
FILED
SEP 11 19
JAMES H. McKENNEY

No. 116

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, and Charles Duncan, Trustee in the Matter of Ingalls, Brothers, Bankrupts, Petitioners,

116

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY et al., Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

William Boyd, Court Printer, 27 Columbia Street, Albany, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. .....

J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company and Charles Duncan, Trustee in the Matter of Ingalls Brothers, Bankrupts,
Petitioners,

vs.

Charles H. Green, and the Fullerton-Powell Hardwood Lumber Company et al.,
Respondents.

Petition for the writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, requiring it to certify to the Supreme Court of the United States for its revision and determination, the appeal and petition for revision in bankruptcy taken by said Charles H. Green and the Fullerton-Powell Hardwood Lumber Company against J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company and Charles Duncan, trustee in bankruptcy of the Ingalls

Brothers, in the matter of Wilber S. Ingalls and Howard R. Ingalls, as individuals and as co-partners of the firm of Ingalls Brothers, bankrupts, in bankruptcy, lately depending in said Circuit Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company, and Charles Duncan, trustee in the matter of Ingalls Brothers, bankrupts, filed under the provisions of section 25a of the Bankruptcy Act of 1898, respectfully represents as follows:

First. This case involves a question entirely novel and one of most vital importance arising under the Bankruptcy Act of 1898. Upon its determination by this court depends to a large extent the usefulness of said act.

On December 3rd, 1903, the Ingalls Brothers were adjudicated bankrupts. Charles Duncan was elected trustee.

In or prior to April, 1903, the J. B. Orcutt Company and the Charles H. Dauchy Company made and verified written proofs of claims against the bankrupts and delivered them to the trustee. On December 19th, 1902, Charles Duncan, the trustee, made and verified a proof of claim of his own against the bankrupts. (Fol. 3.)

Prior to June 1st, 1903, which was before one year after the adjudication, Duncan, the trustee, delivered all three of said proofs of claim properly verified to Henry W. Smith, who was the attorney for the said trustee, with direction to file the same with the referee. (Fol. 5.) The said Henry W. Smith thereafter directed a clerk in his office to file said claim with the referee, which the clerk failed to do. That subsequently said

Smith asked his clerk whether he had filed them and he said he had not; and said Smith then directed his clerk a second time to file them immediately, which the said clerk said he would do. (Fols. 6, 7.)

The claims filed herein prior to December 3, 1903, aggregate about $10,000 and the estate is not large enough to pay them in full. (Fol. 6.) The three claims mentioned herein aggregate upwards of $8,000 (Fols. 2-4.)

On April 2nd, 1904, these three claimants filed with the referee petitions for leave to file such proofs of claims *nunc pro tunc* as of a date prior to December 3rd, 1903. (Fols. 8-9.)

The said Henry W. Smith was not the attorney for any of said claimants, and none of them instructed him to withhold their claims from filing, or knew of any intention on his part of so withholding them, or knew that he had failed to file them until more than a year after said adjudication. (Fol. 8.)

The respondents and others, creditors of said bankrupts, objected to the granting of the relief asked in the said several petitions filed April 2nd, 1904, upon the ground that the proofs of claim had not been seasonably presented to the court, and were barred by section 57a of the Bankruptcy Act. (Fol 9.)

The referee found the facts as herein stated and denied the prayers of the petitioners, refused to receive the proofs of the said three claims on the ground they were presented to him after the expiration of one year after adjudication, and that therefore neither he nor the court had any discretionary power to permit either of said proofs of claims to be filed (fols. 10-11), and made order accordingly. (Fols. 14-16.)

Upon the petitions of Charles H. Dauchy Company, J. B. Orcutt Company and Charles Duncan, dated April 27th, 1904, to the District Court for the Northern District of New York, and upon the certification by the ref-

16 eree to the judge, showing the questions presented, and the findings of fact, which comprise a summary of the evidence relating to the questions presented, and the findings and order of the referee thereon (fols. 17-21), the District Judge made an order on June 28, 1904, that "the proofs of claim of the several petitioners be received and filed by the said referee. (Fols. 22-24.)

17 Thereupon, Charles H. Green, one of the creditors of the said bankrupts, prayed for an appeal from the decision of the District Court to the Circuit Court of Appeals, in his own name (fols. 25-28), which said appeal was allowed, the trustee having declined to take the appeal and to apply for a revision (fols. 31-35) and citations issued thereon. (Fols. 29-31.)

18 Upon the appeal and the petition for review of Charles H. Green and the Fullerton-Powell Hardwood Lumber Company, creditors, the case came on to be heard before the United States Circuit Court of Appeals for the Second Circuit, which said court reversed the order of the District Court, reinstating and affirming the order of the referee, and remanded the case for further proceedings in accordance with the decision.

19 It can readily be observed that if the decree of the Circuit Court of Appeals is permitted to stand it might result in the personal liability of the trustee or his official attorney to the petitioning creditors for the amount of their claim. In view of the circumstances of this case such an enforcement of the claims would be inequitable and unjust in view of the provisions of the Bankruptcy Act, which aim to provide for the pay-

20 ment of claims out of the bankrupt's estate as far as the assets can do so, but does not in any way provide for the payment of claims by third persons other than the bankrupt.

Second. The three questions of law certified by the referee to the District Court, upon which the action of

that court, and of the Circuit Court of Appeals were based are as follows:

1. Does section 57n, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI (1), or otherwise, under the circumstances of this case, to permit a proof of claim to be filed with me subsequent to one year after adjudication, *nunc pro tunc*, as of a date within said year?

3. Should the relief asked by the petitioners have been granted?

Third. Section 57n of the Act of July 1, 1898, above referrred to, provides as follows: "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

Section 57a of the said Act provides: "Proof of claims shall consist of a statement under oath, in writing signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The General Order XXI (1), above referred to was enacted by the Supreme Court of the United States, in pursuance of the powers conferred by the Constitution and laws upon that court, and particularly by the Bankruptcy Act, section 30, approved July 1, 1898.

Section XXI (1) of the General Orders in Bankruptcy provides *inter alia*, as follows:

"Proofs of debt received by a trustee shall be delivered to the referee to whom the cause is referred."

Fourth. Your petitioners are advised and believe that the said judgment of the Circuit Court of Appeals is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress of the United States approved March 3rd, 1891, wherein it is, amongst other things, provided:

"That in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." (26 Stat., p. 828, sec. 6.)

Also of the Bankruptcy Act of July 1st, 1898, wherein it is provided by section 25 (2) (d) as follows:

"Controversies may be certified to the Supreme Court of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

Fifth. It appears from the opinion of the said Circuit Court of Appeals that:

"The referee rejected the claims, but the District Judge reversed his rulings, evidently to conform the practice in the Northern District to that followed in the Southern District in Re Seff (unreported)."

In the case of In re Seff, the facts are glaringly similar to the facts of the case under consideration. They are as follows:

Certain parties having a claim against this bankrupt, sent it within a year after the adjudication to the trustee, care of his attorney's office, which said claim was returned with notice that it should be filed with the ref-

eree. After the termination of the year after the adjudication the claim was sent to the referee, who returned it on the ground that it had not been filed within one year after adjudication. The court reversed the order of the referee, and ordered that the referee should receive and file the proof of claim as of the date when delivered to the trustee. 31

Your petitioners aver that the decision of the court In re Seff is directly contrary to the ruling of the Circuit Court of Appeals in the case now under consideration, and that it is essential to obtain the ruling of this honorable court upon the questions involved in order to obtain a uniformity of construction by the courts of the Bankruptcy Act of July 1, 1898. 32

As it appears in the opinion of the referee, which by order of the Circuit Court of Appeals, was annexed to its decision and made a supplement thereto, the referee found that "it has become logically necessary to disregard In re Seff." Accordingly, the only decision which could be found in point of facts, was, and necessarily had to be disregarded by the referee and the Circuit Court of Appeals, in order to reach the conclusion they came to, must now stand in the balance against the decision of this case, to be forever a stumbling block for those who wish in the future to learn the true construction of the Bankruptcy Act upon this point. It is, therefore, especially important and desirable that this court should declare the meaning of the said sections 57a, 57n of the Bankruptcy Act, and what effect the last sentence of General Order XXI (1) has in this regard for the guidance of the courts of the United States in the construction of said Act, and of parties having claims against bankrupts in knowing whether the language of General Order XXI (1) is operative to protect their rights or is a snare which they must avoid. 33 34 35

Sixth. Your petitioners aver that the decision of the

Circuit Court of Appeals, in its interpretation of section 57 of the Bankruptcy Act, is contrary to the rulings of this honorable court in the case of Hutchinson v. Otis, 190 U. S. 552, in this, that the rulings of the said Circuit Court in effect holds that no proof of claim can be filed with the referee subsequent to one year after the adjudication while this honorable court held, in the case above cited, that a substituted proof of a claim could be filed after that time. In allowing substituted proof of a claim subsequent to the year after adjudication, this honorable court thereby put a broader construction upon section 57 than was allowed by the Circuit Court of Appeals in the case under consideration, and permitted what, the Circuit Court of Appeals in this case has denied.

Seventh. Your petitioners aver that if this honorable court intended only by General Order in Bankruptcy XXI (1) to designate the trustee as a conduit through whom proofs may be delivered to the referee, that they are entitled to the equitable relief sought. In reliance on that General Order, they proved their claims, within the year after adjudication and delivered them to the trustee, only to discover that a year has elapsed, that through no fault of theirs the proofs failed to reach the referee. The referee concedes that the argument "appeals very strongly to his sense of justice." The equities are undoubtedly as much in favor of the allowance of these claims, as they were in the case of Hutchinson v. Otis, supra, wherein this honorable court allowed substituted proof of claims after the year had passed subsequent to the adjudication of bankruptcy.

Eighth. Your petitioners respectfully submit that the questions thus presented by the said record and the petition should be authoritatively and finally adjudged by this honorable court upon and after a full presentation thereof to the court.

Wherefore your petitioners respectfully pray that a 41
writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Second Circuit, directing and requiring said court to certify and send to this court, on a day certain, to be designated therein, a full and complete transcript of said record in the said Circuit Court of Appeals in the said case, therein entitled Charles H. 42
Green and the Fullerton-Powell Hardwood Lumber Company et al. v. J. B. Orcutt Co., Charles H. Dauchy Co., and Charles Duncan, trustee in the matter of Ingalls Bros., bankrupts, to the end that the petitioners' said case may be reviewed and determined by this court in accordance with the statute in such case made and provided, and that your petitioners may have such other and further relief or remedy in the premises as to this 43
court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in said case and every part thereof, may be reversed by this honorable court.

And your petitioners will ever pray.

By

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER, 44
Attorneys for Petitioners.

District of Columbia, ss.:

Reginald S. Huidekoper, being duly sworn, on oath says that he is one of the attorneys for the above-named petitioners, and that the several matters and things set 45
forth and stated in the foregoing petition by him subscribed are true to the best of his knowledge and belief.

REGINALD S. HUIDEKOPER.

Subscribed and sworn to before me this 11th day of September, A. D., 1905.

CHARLES M. JONES,
(Seal.) Notary Public, D. C.

(Endorsed): In the Supreme Court of the United States, October Term, 1905. No. ....., J. B. Orcutt Company, Charles Duncan, Charles Dauchy Company and Charles Duncan, trustee in the matter of Ingalls Brothers, bankrupts, petitioners, v. Charles H. Green, and the Fullerton-Powell Hardwood Lumber Company et al., respondents. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second District.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

WASHINGTON, D. C., August 21st, 1905.

H. D. BAILEY, ESQ.,
FRANK H. DEAL, ESQ.,
Attorneys for Respondents,
Troy, New York.

GENTLEMEN:

Please take notice that on Monday, the 16th day of October, A. D. 1905, at the opening of the court, or as soon thereafter as counsel can be heard, the petition of which the foregoing is a copy will be submitted to the Supreme Court of the United States for its consideration and action.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Attorneys for Petitioners.

Service of a copy of the above notice, and also of the petition for a writ of certiorari and brief in support of the same, acknowledged this ..... day of ...., A. D. 1905.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

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JAMES H. McKENN

No. 116

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY and Charles Duncan COMPANY, Trustee in the Matter of Ingalls Brothers, Bankrupts, Petitioners,

116

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY et al., Respondents.

Brief for the Petitioners in Support of the Petition for a Writ of Certiorari.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

William Boyd, Court Printer, 27 Columbia Street, Albany, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. .....

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY and CHARLES DUNCAN, Trustee in the Matter of Ingalls Brothers, Bankrupts,
Petitioners,

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY, et al.,
Respondents.

Brief in Support of Petition for Writ of Certiorari.

STATEMENT OF FACTS.

This is a case involving the question of the refusal of the referee in bankruptcy to allow the filing of proof of three claims against the bankrupts' estate. The matter

was certified by the referee to the District Court for the Northern *District of New York*, which court reversed the order of the referee. Subsequently the matter came before the Circuit Court of Appeals for the Second Circuit, upon appeal and petition for review, which said court reversed the judgment of the District Court and affirmed the order of the referee. Aftre a diligent search counsel have been able to find but one adjudged case where the point of facts is similar to the case now presented. The rulings in that case are contrary to the decision in this case, and therefore it is extremely desirable to obtain the decision of this honorable court upon the questions involved in order to obtain uniformity of construction of the Bankruptcy Act of 1898.

The facts of the case are as follows:

The Ingalls Brothers were adjudicated bankrupts on December 3, 1902. Charles Duncan was elected trustee. Within a few months after the adjudication the J. B. Orcutt Company verified its claim for $893.68, Charles Duncan verified his claim for $3,848, and The Charles H. Dauchy Company verified its claim for $3,535.67.

The claims of the Orcutt and Dauchy Companies were delivered shortly after their verification to Charles Duncan the trustee, who, prior to June 1st, 1903, delivered them with his individual proof to Henry W. Smith, Esq., who was his official attorney as trustee, but not his personal attorney, with instructions to file them with the referee, which Mr. Smith promised to do.

Shortly after receiving them, Mr. Smith told a clerk in his office to file such proofs of claim with the referee. Subsequently he asked the said clerk if he had filed them, and he said he had not; and Smith then directed said clerk a second time to file them immediately, and the clerk said he would do so. This was all before the expiration of a year after the adjudication. The said

Smith's office was upset for a considerable time during the year by reason of repairs being made thereto.

Subsequently proofs of the three claims were presented to the referee for filing, each of said proofs being accompanied by a petition, dated April 2nd, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3rd, 1903, or for such other and further relief as may be just and proper.

Mr. Smith was not the attorney for any of said claimants, and none of them instructed him to withhold their claims from filing, or knew until more than a year after said adjudication that their claims had not been filed with the referee as they had directed.

The said Henry W. Smith admits that there is no legal liability for him to pay the amount of the claims which were disallowed by the referee, but he feels that morally he owes a duty to those whose claims have been thus disallowed, not to permit them to suffer on account of the neglect of a clerk in his employ.

The claims filed with the referee prior to December 3, 1903, aggregate about $10,000.00, and the estate is not large enough to pay them in full. The three claims in question aggregate somewhat above $8,000.00. Thus, without fault on their part, the owners of almost half the liabilities of the bankrupts find themselves wholly shut out from the distribution unless they can have remedy from this honorable Court.

The three questions certified by the referee to the Court for review are as follows:

1. Does section 57n, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI (1), or otherwise, under the circumstances of this case, to permit a proof of claim to be filed with me sub-

sequent to one year after adjudication *nunc pro tunc* as of a date within said year?

3. Should the relief asked by the petitioners have been granted?

The relief sought by these petitioners is that they should have been allowed to file their proof of claims with the referee, which they had duly verified within one year after the adjudication and had delivered to the trustee, and that it was error for the referee to refuse to permit them to file the said claims with him.

POINT I.

There is no provision in the Bankruptcy Act which fixes the time within which proofs of claim must be filed.

The referee was under the impression that section 57n of the Bankruptcy Act is mandatory in this regard, and he seems to have been entirely governed thereby in reaching his conclusion. The language of section 57n is as follows:

"Claims shall not be *proved* against a bankrupt estate subsequent to one year after the adjudication."

It will be seen that this subsection of the act does not limit the time within which a proof of claim must be *filed* with the referee, but merely limits the time within which claims must be *proved*.

There are three distinct steps prescribed by section 57 of the Bankruptcy Act with respect to a claim against a bankrupt estate before it can share in dividends:

1. It must be proved.
2. It must be filed.
3. It must be allowed.

See In re Hornstein, 10 Am. B. R. 308.

Considering these three distinct steps in the inverse order, it will be noticed that subdivision (d) of section 57, relating to the *allowance* of claims, provides: "Claims which have been duly proved shall be allowed, &c."

Subdivision (c) of section 57 relates to the *filing* and provides that: "Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee, if the case has been referred."

Subdivision (a) of section 57 relates to the proof of a claim and expressly defines the term proof of claims in the following language:

"Proof of claims shall consist of a statement, under oath, in writing, signed by a creditor setting forth his claim, the consideration therefor, and whether any, and, if so, what, securities are held therefor, and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

If it is true, as contended for by the respondents that "proof of claims" includes "filing," then what is the meaning of the language of subdivision (c) above quoted? Does not this section contemplate two distinct acts, one the proving of the claim and one the disposition of the proof after the proof is complete? Subdivision (a) expressly defines what the "proof of claim" shall consist of, and leaves no room for the construction of that term. The term is expressly defined

and limited to the doing of certain things. We emphatically deny that the term as here used can require the doing of other things not included in the definition. That the term "proof of claim" does not include "filing" is shown by the case of In re Hornstein, *supra*, where, in the course of the opinion, the Court, on page 320, uses the following language:

"After liquidation (step one), they (claims) may be proved (step two), as required by section 57a, and then filed for allowance (step three), and then allowed (step four)."

It is not to be presumed that Congress, after having carefully defined the word proved, as used in the Bankruptcy Law, and especially as used in section 57 thereof, intended to use the same word in that very section with another and broader meaning, embracing another word from which it is in the very section differentiated.

The referee admits that "as matter of first impression, the construction urged seems almost conclusively reasonable."

Not only is it reasonable, but *almost* conclusive. Why not quite? Two reasons only are urged by him; first, that it is absurd; and second, that courts have assumed the contrary.

The definition of "proved" in section 57a has the sanction of positive law, and no matter what its absurdity, it exists as a fact. But the "absurdity" of the definition, or of assuming that Congress intended to follow its own definition, is not as alarming as it seems to the referee to be. He says there can be only "some purely speculative reason" for the existence of 57n if "proved," as there used, be thus defined. To be sure we can only speculate as to the motive of Congress in the selection of "proved" instead of "filed;" still it

may be presumed to have done so advisedly and for the very purpose of leaving open a door for the prevention of hardship. The framers of the bill may well have reasoned that by proving his claim the claimant would manifest his intention to present it, and that ordinarily, and barring accident, filing would promptly follow proof; and that claimants should not, by force of a statutory prohibition, be deprived of all protection in case by accident, without fault of their own, their claims should fail to reach the referee. It may be argued that by basing the limitation upon the proving, a door for fraud would be left open. In what respect? What object could there be in withholding a claim? We can think of none, save the hope of preventing investigation. But that could not avail. Allowance must follow filing; and no claim can be allowed until creditors have opportunity to investigate and attack it. Moreover, a very potent check upon the holding back of claims for any purpose exists in the fact that the belated claim may be shut out from sharing in distribution; for there is no doubt that claims may be filed after dividends have been declared and paid, and that creditors who have been negligent in proving their claims take their chances of there being sufficient assets to make them good as to previously declared dividends.

If we are to speculate as to the genesis of section 57n, it is more reasonable to presume that Congress employed the word "proved" deliberately for some such purpose as we have indicated, than that it intended to ignore its own definition.

The other bugbear which serves to deprive the learned referee of the courage of his convictions, is that the courts seem to have assumed in sundry cases, that "proved," as used in section 57n, includes "filed," and that claims must be actually filed before the expiration of a year after adjudication.

In none of the cases which have heretofore been cited by counsel for respondent, and by the referee, is there a suggestion that the claim was verified within the year after adjudication, and left with the trustee, with directions to file them, but not filed until after the year had expired. In fact the referee, in his opinion, says: "None of them (the decisions) specifically appear to have been predicated upon the precise state of facts disclosed here, *i. e.*, upon proofs verified within the year, but offered for filing thereafter."

Not only is this true, but it appears affirmatively, or by necessary inference from the facts stated, in at least five of the cases cited, that the claim was not verified within the year. In three other cases, it does not appear that the court even assumed that "proved" was not used in section 57n with the precise meaning given in 57a; and in two others, no belated claim was under consideration.

Those cases are therefore only authority for the facts appearing therein, and whatever the courts have said or assumed in those cases, is *obiter* as to the question here under consideration.

The court, in the case of Hutchinson v. Otis, 190 U. S. 552, held that it was proper to permit the filing of an amended proof of claim subsequent to one year after adjudication. In the course of the opinion it was said (page 555): "Proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within section 57n forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow."

POINT II.

Granted that the Act limits the time within which proofs must be presented to one year after adjudication, it is sufficient if they be presented within that time to the trustee.

We admit that the allowance of a claim is undoubtedly the function of the referee, and that for the purpose of his consideration the proof must in some way come to him. It does not, however, follow that it must be delivered to him in the first instance. On the contrary the act itself prescribes by section 57c:

"Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred."

Here, therefore, by the specific terms of the act is another place where the proof of claims may be deposited by the claimants. Could it be doubted that those who had presented their proof of claims, within the year after adjudication, to the court, are entitled to have those claims passed upon by the referee for the purpose of allowance? Had the clerk of the court to whom the claims were presented neglected to deliver such proof of claims to the referee, within the year, should the claimants be deprived of their right to have claims allowed, according to the provisions of the act? Unquestionably not. The neglect of the clerk could not be imputed to them, and our contention is that claims may also be delivered to the trustee, to be by him transmitted to the referee. The last sentence of General Order XXI (1) provides that:

"Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

By the terms of this provision the Supreme Court has undertaken to prescribe a specific duty of the trustee, the duty of delivering to the referee all proof of claims delivered to him; and by necessary implication, to designate the trustee as a third depositary for such proofs.

Had the Supreme Court power to impose such a duty upon the trustee, and thereby to designate him as a depositary for the proof of claim?

Section 30 of the act of July 1, 1898, provides:

"All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

This section of the Bankruptcy Act recognizes that great embarrassment would arise if it were attempted to carry into effect the act without fixing officers' duties more fully than they are therein prescribed.

The court has assumed under this general authority that it has the power to prescribe the duties of officers, in addition to those prescribed by the act, and has accordingly prescribed many such duties, as witness: General Orders I, II, III, XII, XVII, XXIV, XXVI and others. Section 51 of the act prescribes "duties of clerks." Other duties of clerks are prescribed by General Orders I, II and II.

Section 39 prescribes "duties of referee." Other duties of referees are prescribed by General Orders XII, XXIV and XXVI.

Section 57 of the act prescribes "duties of trustees." Other duties of trustees are prescribed by General Order XVII.

The provisions of General Order XXI (1) above referred to stand on the same basis as the General Orders last referred to, and as far as these petitioners are concerned it merely adopts a mode of procedure, in addition to those provided for in the act, which they may follow in order to have their claims reach the referee for allowance. The basis of the respondents' contention seems to be that the act having designated a form of procedure, in bringing their proof of claims to the referee, such form cannot be changed. They seem to overlook the settled rule of law that no one has a vested right in a specific mode of procedure, and so long as a different mode of procedure does not operate to impair existing rights it cannot be objected to.

That the petitioners had the right to file their claim within a year after adjudication cannot be doubted. That they presented such proof of claims seasonably to the trustee with instructions to file them with the referee, is admitted. That the trustee failed to carry out the duty imposed upon him by General Order XXI (1) is also shown.

In this connection it is well to call the court's attention to the language of section 57c of the act, wherein it is provided that "claims after being proved *may*, for the purpose of allowance, be filed" in court or with the referee. While General Order XXI (1) provides that "Proof of debt received by any trustee *shall* be delivered to the referee," the language of section 57c is not mandatory but permissive only. It does not say that proof of claim "*shall*" be filed with the court or referee and nowhere else. Taken in connection with General Order XXI (1) which is mandatory in regard to the duty of the trustee as to the disposition of claims deposited with him, we have a third depository for the procedure which claimants may adopt, and a mandatory duty imposed upon the third depositary (the trustee) to

present the proof of claims, so left with him, with the referee in order that they may be allowed, and to prevent the very hardship which is now attempted to be enforced against them. It is quite true that the Supreme Court is not the legislative but the judicial unit of our tripartite form of government, but neither can it be doubted that it has the power of enacting and enforcing rules of court for the restriction and benefit of those practicing therein. The power was conferred upon the Supreme Court in bankruptcy matters to prescribe "all necessary rules, forms and orders as to procedure and for carrying the act into effect." (Sec. 30 Bankruptcy Act.) The only limitation upon this power is that the rules shall not be inconsistent with the act. Within that limit the rules have the force of positive law. As was said in the case of In re Scott, 3 Am. B. R. 625:

"The general orders and rules promulgated by the Supreme Court in accordance with the statute (section 30) are obligatory and binding upon the courts of bankruptcy. They confer rights as well as prescribe rules of practice."

The last sentence of General Order XXI (1) is not in derogation of section 57c of the act, which provides that claims after being proved *may*, for the purpose of allowance be filed by the claimants in the court or before the referee.

Upon examination of section 57 of the act it will be found that throughout all its subdivisions the words "shall" and "may" are used discriminately, the word "shall" being used in each case where the provision is mandatory. Moreover it is the cardinal rule of legal interpretation that the word *may* is not mandatory but is permissive only unless used when conferring power on public officers or bodies for public purposes, in which sense it unquestionably is not used in section 57.

General Order XXI (1) is not inconsistent with section 57 of the act but merely supplementary to the act, and since it relates merely to procedure would insure and not prevent compliance with the act.

The most reasonable construction of section 57c of the act is that the designation of the two depositaries there named is permissive only and not exclusive, and that the Supreme Court may, in the exercise of its prerogatives of framing necessary rules of practice, designate additional ones.

The last sentence of General Order XXI (1) relating to matters of procedure and not being inconsistent with, but supple[illegible] to, the act is both as to the duties prescribe[illegible] the procedure sanctioned well within the power [illegible] Supreme Court of the United States, both inherently and as authorized by the Bankruptcy Act.

The Supreme Court having adopted that construction and prescribed such duty and procedure, who will gainsay it?

In the courts below counsel attempted to account for the existence of the final sentence of General Order XXI (1) as a survival of the general orders under the former Bankruptcy Act, to which it was pertinent, and suggests that it has, through carelessness, crept into the present rules, where it has no proper place. His surmise is interesting, it may or may not be true. It must, however, be assumed that the Supreme Court formulated the present rule and used all its language deliberately and for a definite purpose. What that purpose may have been is probably immaterial, but may not be difficult to surmise. The court found broad general provisions in the act that claims might be filed with the court or referee, and that they must be filed (assuming that "proved" in section 57n means "filed") within a fixed time. The act also provided for another officer,

the trustee, with whom creditors would naturally come into more intimate relations than with either court or referee, and to whom it might be more convenient to deliver their proofs. In view of these facts the Supreme Court may well have considered that it would conduce to the convenience of creditors and upon the whole to the prompt and certain presentation of claims and, therefore, aid in "carrying the act into force and effect," to permit proofs to be handed to the trustee, taking care, however, to direct the trustee to transmit them to the referee.

The referee dwells upon the contention that "if any duty was imposed upon the trustee by General Order XXI (1), the trustee is at fault and the remedy of the petitioners is upon his bond."

Assuming that General Order XXI (1) did impose a duty upon the trustee, it is not clear that an action would lie upon the trustee's bond, which was given to ensure "the faithful performance of all his official duties as such trustee."

There may be a grave question whether a trustee, whose duty it is to transmit a paper to a specified person or place, does not faithfully perform such duty when he in good faith entrusts the paper for transmission to a messenger upon whom he has a right to rely, as he certainly ought to have upon his official attorney.

Again, assuming that the trustee has failed to perform a duty imposed upon him, and the consequences of such failure may be relieved against by the Court without imperiling the right of any creditor to his ratable share of assets as prescribed by the Bankruptcy Act, must not recourse be had to this remedy, rather than to the official bond of the trustee; and would this not be a complete defense to an action upon the bond?

Perhaps the most complete answer to the proposition

of the referee above quoted is suggested by the word "if." "If any duty was imposed," &c.

The premise is hypothetical. In fact, the referee finds that no duty was imposed and therefore that there is no remedy against the trustee on his bond. But assuming that it is doubtful, should the petitioning creditors be put to the hazard of the doubt?

Should they be compelled to seek a doubtful remedy against the trustee on his bond, when this Court can grant them sure relief, without infringing on the rights of any one?

The referee does not go the length of denying equitable standing, but says instead, referring to General Order XXI (1): "If it does not impose a duty, creditors cannot rely upon it, since they were not justified in depending on mere volunteer action."

But how were the petitioners to know that the trustee, in taking their proofs, was a mere volunteer? The Supreme Court has announced that he was not. Are laymen to be charged with greater wisdom than the court?

The referee does not deny the equity, but seems to think the Court has no power to do equity in this particular case; that the unfortunate petitioners have no remedy, except such as may exist against a mere gratuitous bailee, for his negligence, and as the referee truly intimates, if that bailee be a mere volunteer, the prospect of recovery would be slim indeed.

It is submitted that the referee is wrong in his conclusion that even if the petitioners have no legal standing, the Court has power to and should give them no equitable relief. The petitioners should not be put to the hazard of an action on the trustee's bond, which, upon the contention of counsel and referee, would be fruitless, or of an action for damages against either the

trustee or attorney, as bailee, the issue of which would be at least doubtful.

The fund is in court. No reason exists why every honest creditor should not be allowed to participate in it, except the statutory prohibition, and that, it is conceded, may in a proper case be relaxed.

It is submitted that this is a proper case.

POINT III.

But assume that the Supreme Court has mistaken the limitation of its power; and that the last sentence of G. O. XXI-1 is invalid; upon general principles of equity the order of the District Judge should be sustained.

The District Judge says rightly that "the equities are certainly with the creditor, and if possible his contention should be maintained."

Even the referee concedes that "the arguments appeal very strongly to the sense of justice."

This proposition seems too plain for argument, despite the claim of counsel that "if there was no duty imposed (upon the trustee or his attorney) then the creditors have done nothing to entitle them to any consideration, even from an equitable standing." They have equities quite outside the act or orders, or the duties thereby imposed upon officers or upon themselves. They have, so far as now appears, or as there has so far been occasion to consider, honest claims in amount nearly one-half the total indebtedness of the bankrupt estate. They ask nothing except to be permitted to receive their share of the assets; they seek to deprive

other creditors of nothing to which they are justly entitled. This alone gives them equitable standing.

Counsel for appellants mistake the purpose of the Bankruptcy Act when they assume that it is devised for the exclusive benefit of diligent creditors. That is the purpose of judgment and execution, of sundry provisional remedies, and has been an important feature of various State insolvency and general assignment laws. But to shut out creditors is contrary to the fundamental principles of the Bankruptcy Act, to wit, the ratable distribution of all the assets in payment of all the liabilities.

But these claimants have not been negligent. This is true even within the contemplation of the Bankruptcy Act. They verified their claims promptly, and seasonably attempted to start the proofs on the way toward allowance. Even though they believed the proofs must come to the hands of the referee within the year, they were not negligent. Even if the trustee and his attorney are regarded as messengers, it was not negligent for the claimants to entrust the proofs to their care. Business men cannot attend personally to every detail of their affairs. Mails and messengers must be employed and must be trusted.

The equitable standing of the respondents being established, is it still impossible to relieve them?

Aside from the power inherent in the Court to afford equitable relief in appropriate cases, it has been frequently decided that such relief may be granted even where a date fixed by the Bankruptcy Act has lapsed.

In Matter of Towne, 10 Am. B. R. 284, it appeared that the creditor was misled by the omission of assets from the schedule prepared by the bankrupt, and so did not even verify his claim within the year. The referee refused to receive the proof, but was reversed by the district judge.

In re Wolff, 4 Am. B. R. 74, it was held that where performance of an act, required by statute to be done within a specified time, was by default of the court delayed beyond that time, relief might be granted.

See, also, Hutchinson v. Otis, 190 U. S. 552, cited in Point I.

Among the particulars in which the Towne case, above cited, differs from the one at bar, is that the petitioner there sought to come in for payment only after other creditors should have been paid in full. For aught that appears that was all the relief needed. Such relief would not avail here, and more is sought and granted. This distinction, however, renders the case cited none the less applicable to illustrate the proposition that the Court has power to grant equitable relief, appropriate, of course, to given circumstances.

Upon the hypothesis stated at the beginning of this point (Point III), namely, that the Supreme Court of the United States had no power to authorize the delivery of claims to the trustee:

The Supreme Court has promulgated a general order, under the supposed sanction of the statute, which both statute and order, the public are presumed to know and obey, and creditors of a bankrupt, in reliance thereon, have delivered their claims to the trustee, only to discover, after the year has elapsed, that the order upon which they relied was void.

The claimants had a right to believe they had performed their full duty in the premises when their proofs were placed in the trustee's hands.

If not, the last sentence of General Order XXI (1) is a snare. By it the Supreme Court of the United States says to the creditors:

"You may file your proofs directly with court or referee, as the act provides, or, if more convenient to

you, may deliver them to the trustee, relying upon our direction, hereby given to him, to transmit them to the referee."

It fails to add, as to the latter alternative: "But you do so at your peril."

There can be no clearer case of a court misleading a creditor to his injury. It is quite as strong as those of Towne and Wolff, above cited, and other cases in which great latitude has been allowed in furtherance of equity.

The referee says: "It was not misapprehension, but was carelessness which produced the trouble." And again, referring to the final sentence of General Order XXI (1): "Its existence is certainly unfortunate, and particularly to the petitioners, if their present plight is attributable to it. That, however, seems not to be at all the case, the proximate cause being mere carelessness, although not imputable to them."

The referee totally ignores the familiar rule that when an injury is attributable to two causes, without either of which it would not have happened, both are to be regarded as proximate causes.

It may be conceded that but for carelessness in the office of the attorney for the trustee, the referee would have received the proofs within the year. But if they had not been first delivered to the trustee such carelessness would not have become operative. And it must be assumed that but for the implied permission contained in General Order XXI (1) the proofs would never have been delivered to the trustee, but would have been filed directly with the referee within the year. The existence of the rule was as much a proximate cause of the default as was the negligence in the attorney's office.

In the Muskoka Lumber Co. case, 11 Am. B. R. 761, referred to by counsel before the Circuit Court of Appeals with expression of surprise that the district judge could have distinguished the two cases, no claim had

been presented to any officer, or even verified, within the year; so that neither act nor rule had been complied with.

The only ground upon which the claim could have been received was that of equity; and that presented no very strong appeal to the discretion of the court: for the claim was not scheduled, and therefore would not be affected by the discharge of the bankrupt.

POINT IV.

The case, "In the Matter of Abraham Seff," is not only an authority here, but is the only case, besides the one at bar, in which the precise questions here presented appear to have been considered.

As that case, decided by the district judge of the Southern District of New York, in December, 1902, is unreported, and, in fact, no opinion appears to have been written, a certified copy of the record is appended hereto.

In that case the circumstances were, in all important particulars, identical with those at bar; indeed, the case of the present petitioners is in one respect stronger than in the Seff case, since a question arose there as to whether the proof had in fact been delivered within the year to the trustee.

In that case, as in this, the proof had been (so the court decided) delivered seasonably to the trustee, who failed to file it with the referee. In that case, as in this, the creditor offered the proof to the referee after the expiration of the year. In that case, as in this, the

referee declined to accept it, alleging lack of power as the reason for his action, and the district judge reversed him.

In the Seff case, it does not appear that objection was made before the district judge. But the same was true as to the referee; still he denied the relief sought, and the presumption is that the district judge would also have denied it, if he had thought proper, even though no creditor objected.

In re McCallum, 11 Am. B. R. 447, 449.

The judgment of the Circuit Court of Appeals should be reversed.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

Appendix.

UNITED STATES OF AMERICA,
Southern District of New York, ss.:

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 4th day of May, in the year of our Lord one thousand nine hundred and four, and of the Independence of the said United States, the one hundred and twenty-eighth.

THOS. ALEXANDER,

[SEAL.] Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter
of
Abraham Seff, Bankrupt.

You will please take notice, That we shall move this Court, at a term thereof, to be held in Room 16, Post-office Building, in the city of New York, on the 5th day of December, 1902, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for a decision upon the annexed question certified

to this Honorable Court by Peter B. Olney, Esq., Referee in Bankruptcy, to whom the above-entitled matter was referred.

Dated December 10, 1902.

Yours, etc.,

WILMER & CANFIELD,

Attys. for the Bradstreet Co.

No. 49 Wall Street, Manhattan, New York City.

To Messrs. Stern, Singer & Barr,

Attorneys for the Trustee,

No. 309 Broadway, New York City.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter of Abraham Seff, Bankrupt.	In Bankruptcy.

I, Peter B. Olney, one of the referees in said Court in Bankruptcy, do hereby certify that in the course of proceedings in said cause before me, the following question arose pertinent to the said proceeding:

On or about the 4th day of November, 1901, one Abraham Seff was duly adjudged a bankrupt by the District Court of the United States for the Southern District of New York, and at the said time said Seff was indebted to the Bradstreet Company in the sum of fifty ($50.00) dollars as appears by proof of claim hereto annexed. That on the 23d day of October, 1902, the Bradstreet Company sent said claim to the trustee of said estate, Louis Goetting, Esq., care of Messrs. Stern, Singer & Barr, the trustee's attorneys, No. 309

Broadway, New York city. Said claim was returned by said Goetting or his attorneys with a statement that it should have been filed with the Referee in Bankruptcy, and that a filing fee of one dollar should have been paid therefor, and on the 7th day of November, 1902, said claim was sent to me as Referee, No. 68 William street, together with the filing fee of one dollar, but I returned the said claim and filing fee on the ground that it had not been filed within one year after the adjudication in bankruptcy.

The trustee's office is not at No. 309 Broadway, but is at No. 78 Leonard street, New York city. No. 309 Broadway is the address of the attorneys for the trustee, Messrs. Stern, Singer & Barr, who received the claim and returned it to the Bradstreet Company prior to the expiration of the year subsequent to the adjudication. It is claimed by the Bradstreet Company as shown in the annexed affidavit, that the claim was filed with the trustee prior to the end of the first year after the adjudication of bankruptcy. Under the last part of section 21 of the General Rule in Bankruptcy, it is provided as follows: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

It is further claimed by the Bradstreet Company that mailing the proof of claim of Louis Goetting, Esq., care of Messrs. Stern, Singer & Barr, his attorneys, No. 309 Broadway, was in fact filing the claim with the trustee. I, the Referee, find that I have not the power to allow and file the claim, and I so order.

And the question is certified to the Judge for his opinion thereon.

Dated New York City, New York, the day of November, A. D., 1902.

PETER B. OLNEY,
Referee in Bankruptcy.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter
of
Abraham Seff, Bankrupt.

On reading and filing the notice of motion dated December 10, 1902, with the admission of Stern, Singer & Barr, attorneys for the trustee herein thereon, and the question relating to the filing of the proof of claim of the Bradstreet Company, certified to this Court for its decision thereon, by Peter B. Olney, Esq., one of the Referees in Bankruptcy to whom the above-entitled matter was referred,

Now, on motion of Wilmer & Canfield, attorneys for the Bradstreet Company, the moving creditor herein, it is

Ordered, That the proof of claim of the Bradstreet Company be received and filed as of the date when delivered to the trustee.

Dated December 18th, 1902.

GEO. B. ADAMS,
U. S. D. J.

The claim will be received as of the date when delivered to the trustee.

G. B. A.

FILE COPY.

NOV 8 1906

JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 116.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, and CHARLES DUNCAN, Trustee, in the Matter of Ingalls Brothers, Bankrupts, Petitioners,

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY, *et al.*, Respondents.

BRIEF FOR THE PETITIONERS

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 116.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, AND CHARLES DUNCAN, TRUSTEE, IN THE MATTER OF INGALLS BROTHERS, BANKRUPTS, Petitioners.

vs.

CHARLES H. GREEN AND THE FULLERTON-POWELL HARDWOOD LUMBER COMPANY, ET AL., Respondents.

BRIEF FOR PETITIONERS.

Statement of Facts.

This is a case involving the question of the refusal of the referee in bankruptcy to allow the filing of proof of three claims against the bankrupts' estate. The matter was certified by the referee to the District Court for the Northern District of New York, which court re-

versed the order of the referee. Subsequently the matter came before the Circuit Court of Appeals for the Second Circuit, upon appeal and petition for review, which said court reversed the judgment of the District Court and affirmed the order of the referee. The case is in this court upon a writ of certiorari issued to the Circuit Court of Appeals.

The facts of the case are as follows:

The Ingalls Brothers were adjudicated bankrupts on December 3, 1902. Charles Duncan was elected trustee. Within a few months after the adjudication the J. B. Orcutt Company verified its claim for $893.68, Charles Duncan verified his claim for $3,848, and the Charles H. Dauchy Company verified its claim for $3,535.67.

The claims of the Orcutt and Dauchy Companies were delivered shortly after their verification to Charles Duncan, the trustee, who, prior to June 1, 1903, delivered them with his individual proof to Henry W. Smith, Esq., who was his official attorney as trustee, but not his personal attorney, with instructions to file them with the referee, which Mr. Smith promised to do.

Shortly after receiving them, Mr. Smith told a clerk in his office to file such proofs of claim with the referee. Subsequently he asked the said clerk if he had filed them, and he said he had not; and Smith then directed said clerk a second time to file them immediately, and the clerk said he would do so. This was all before the expiration of a year after the adjudication. The said Smith's office was upset for a considerable time during the year by reason of repairs being made thereto.

Subsequently proofs of the three claims were presented to the referee for filing, each of said proofs being accompanied by a petition, dated April 2, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3, 1903, or for such other and further relief as may be just and proper.

Mr. Smith was not the attorney for any of said claimants, and none of them instructed him to withhold their claims from filing, or knew until more than a year after said adjudication that their claims had not been filed with the referee as they had directed.

The said Henry W. Smith admits that there is no legal liability for him to pay the amount of the claims which were disallowed by the referee, but he feels that morally he owes a duty to those whose claims have been thus disallowed, not to permit them to suffer on account of the neglect of a clerk in his employ.

The claims filed with the referee prior to December 3, 1903, aggregate about $10,000.00, and the estate is not large enough to pay them in full. The three claims in question aggregate somewhat above $8,000.00. Thus, without fault on their part, the owners of almost half the liabilities of the bankrupts find themselves wholly shut out from the distribution unless they can have remedy from this honorable Court. (Record, pp. 1–2.)

The three questions certified by the referee to the Court for review are as follows:

1. Does Section 57n, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI (1), or otherwise, under the circumstances of this case, to permit a proof of claim to be filed with me subsequent to one year after adjudication *nunc pro tunc* as of a date within said year?

3. Should the relief asked by the petitioners have been granted? (Record, p. 4.)

The relief sought by these petitioners is that they should be recognized as creditors in the distribution of the bankrupt's estate, having filed their claims within the period of one year after adjudication.

ASSIGNMENT OF ERROR.

The United States Circuit Court of Appeals for the Second Circuit erred in reversing the order of the District Court, which reversed the ruling of the referee rejecting the claims of the appellant creditors of the bankrupt.

ARGUMENT.

POINT I.

There is no provision in the Bankruptcy Act which fixes the time within which proofs of claim must be filed.

The referee was under the impression that Section 57n of the Bankruptcy Act is mandatory in this regard, and he seems to have been entirely governed thereby in reaching his conclusion. The language of Section 57n is as follows:

> "Claims shall not be *proved* against a bankrupt estate subsequent to one year after the adjudication."

It will be seen that this subsection of the act does not limit the time within which a proof of claim must be *filed* with the referee, but merely limits the time within which claims must be *proved*.

There are three distinct steps prescribed by Section 57 of the Bankruptcy Act with respect to a claim against a bankrupt estate before it can share in dividends:

1. It must be proved.
2. It must be filed.
3. It must be allowed.

See *In re* Hornstein, 10 Am. B. R., 308–320.

Considering these three distinct steps in the inverse order, it will be noticed that subdivision (d) of Section 57, relating to the *allowance* of claims, provides:

> "Claims which have been duly proved shall be allowed, &c."

Subdivision (c) of Section 57 relates to the *filing* and provides that:

> "Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee, if the case has been referred."

Subdivision (a) of Section 57 relates to the proof of a claim and expressly defines the term proof of claims in the following language:

> "Proof of claims shall consist of a statement, under oath, in writing, signed by a creditor, setting forth his claim, the consideration therefor, and whether any, and, if so, what, securities are held therefor, and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

If it is true, as contended for by the respondents that "proof of claims" includes "filing," then what is the meaning of the language of subdivision (c) above quoted? Does not this section contemplate two distinct acts, one the proving of the claim and one the disposition of the proof after the proof is complete? Subdivision (a) expressly defines what the "proof of claim" shall consist of, and leaves no room for the construction of that term. The term is expressly defined and limited to the doing of certain things. We emphatically deny the term as here used can require the doing of other things not included in the definition. That the term "proof of claim" does not include "filing" is shown by the case of *In re* Hornstein, *supra*, where, in the course of the opinion, the court, on page 320, uses the following language:

> "After liquidation (step one), they (claims) may be proved (step two), as required by Section 57a, and then filed for allowance (step three), and then allowed (step four)."

It is not to be presumed that Congress, after having carefully defined the word proved, as used in the Bankruptcy Law, and especially as used in Section 57 thereof, intended to use the same word in that very section with another and

broader meaning, embracing another word from which it is in the very section differentiated.

The referee admits that "as matter of first impression, the construction urged seems almost conclusively reasonable."

Not only is it reasonable, but *almost* conclusive. Why not quite? Two reasons only are urged by him; first, that it is absurd; and second, that courts have assumed the contrary.

The definition of "proved" in Section 57a has the sanction of positive law, and no matter what its absurdity, it exists as a fact. But the "absurdity" of the definition, or of assuming that Congress intended to follow its own definition, is not as alarming as it seems to the referee to be. He says there can be only "some purely speculative reason" for the existence of 57n if "proved," as there used, be thus defined. To be sure we can only speculate as to the motive of Congress in the selection of "proved" instead of "filed"; still it may be presumed to have done so advisedly and for the very purpose of leaving open a door for the prevention of hardship. The framers of the bill may well have reasoned that by proving his claim the claimant would manifest his intention to present it, and that ordinarily, and barring accident, filing would promptly follow proof; and that claimants should not, by force of statutory prohibition, be deprived of all protection in case by accident, without fault of their own, their claims should fail to reach the referee. It may be argued that by basing the limitation upon the proving, a door for

fraud would be left open. In what respect? What object could there be in withholding a claim? We can think of none, save the hope of preventing investigation. But that could not avail. Allowance must follow filing; and no claim can be allowed until creditors have opportunity to investigate and attack it. Moreover, a very potent check upon the holding back of claims for any purpose exists in the fact that the belated claim may be shut out from sharing in distribution; for there is no doubt that claims may be filed after dividends have been declared and paid, and that creditors who have been negligent in proving their claims take their chances of there being sufficient assets to make them good as to previously declared dividends.

If we are to speculate as to the genesis of Section 57n, it is more reasonable to presume that Congress employed the word "proved" deliberately for some such purpose as we have indicated, than that it intended to ignore its own definition.

The other bugbear which serves to deprive the learned referee of the courage of his convictions, is that the courts seem to have assumed in sundry cases, that "proved," as used in Section 57n, includes "filed," and that claims must be actually filed before the expiration of a year after adjudication.

In none of the cases which have heretofore been cited by counsel for respondent, and by the referee, is there a suggestion that the claim was verified within the year after adjudication, and left with the trustee, with directions to file them, but not filed until after the year had

expired. In fact the referee, in his opinion, says: "None of them (the decisions) specifically appear to have been predicated upon the precise state of facts disclosed here, *i. e.*, upon proofs verified within the year, but offered for filing thereafter."

Not only is this true, but it appears affirmatively, or by necessary inference from the facts stated, in at least five of the cases cited, that the claim was not verified within the year. In three other cases, it does not appear that the court even assumed that "proved" was not used in Section 57n with the precise meaning given in 57a; and in two others, no belated claim was under consideration.

Those cases are, therefore, only authority for the facts appearing therein, and whatever the courts have said or assumed in those cases, is *obiter* as to the question here under consideration.

The court, in the case of Hutchinson *vs.* Otis, 190 U. S., 552, held that it was proper to permit the filing of an amended proof of claim subsequent to one year after adjudication. In the course of the opinion it was said (page 555): "Proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within Section 57n forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow."

It should be remembered that the bankruptcy act is

in derogation of the common right of a creditor to recover his debt from his debtor. Not only this, but the section under consideration (57n) undertakes to work a forfeiture of the creditor's right against the estate of his debtor if he fails to make proof of his claim within a prescribed period. As we have seen, this section reads, "Claims shall not be *proved* against the bankrupt estate subsequent to one year after the adjudication." By the contention urged by the respondents, the court is asked to change the language of this section so that it will read, "Claims shall not be *filed in court or with the referee* subsequent to one year after the adjudication."

This Court has said:

> "Forfeitures are not favored in the law. Courts always incline against them."
>
> Marshall *v.* Vicksburg, 15 Wall., 146.

> "When either of two constructions can be given to a statute and one of them involves a forfeiture, the other is to be preferred."
>
> Vattel, 29th Rule of Construction.
>
> Farmers and Mechanics National Bank *v.* Dearring, 91 U. S., 29.

The Court has also said, by Chief Justice Marshall:

> "Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object."
>
> Rutherford *v.* Greene's heirs, 2 Wheat., 196.

We say that the language of the statute in this case is plain and must be followed, while the respondents say that the language at best is ambiguous and the court should place such meaning upon it as will give practical effect to it, notwithstanding such effect will work a forfeiture of the rights of the petitioning creditors and inure to the benefit of the respondent creditors. But if the meaning is ambiguous, such ambiguity should be resolved in favor of the petitioning creditors.

> "It is a useful and safe rule of construction to resolve any ambiguity or obscurity in a statute in favor of such a reading of it as will best meet the demands of natural justice, so far as that can be done without violence to settled legal principles."
>
> Plum *v.* City of Kansas, 101 Mo., 525.

The purpose of the Bankruptcy Act is to provide for equality in distribution among creditors and not to enforce forfeitures as against particular creditors. By placing the narrow construction upon Sec. 57n contended for by the respondents, a forfeiture of the rights of certain creditors will be enforced.

> "All statutes which encroach on the personal or property rights of the individual are to be construed strictly. It will be presumed, in the absence of express words or necessary intendment or implication, that a statute is not intended to interfere with or prejudice a private right or title. In this class are embraced all statutes which work a forfeiture or confiscation of the private property of a particular person or a particular class of persons."
>
> 26 A. and E. Ency. of Law, p. 661.

POINT II.

Granted that the Act limits the time within which proofs must be presented to one year after adjudication, it is sufficient if they be presented within that time to the trustee.

We admit that the allowance of a claim is undoubtedly the function of the referee, and that for the purpose of his consideration the proof must in some way come to him. It does not, however, follow that it must be delivered to him in the first instance. On the contrary the act itself prescribes by Section 57c:

> "Claims after being proved may, for the purpose of allowance, be filed by the claimants *in the court* where the proceedings are pending *or before the referee* if the case has been referred."

Here, therefore, by the specific terms of the act is another place where the proof of claims may be deposited by the claimants. Could it be doubted that those who had presented their proof of claims, within the year after adjudication, to the court, are entitled to have those claims passed upon by the referee for the purpose of allowance? Had the clerk of the court to whom the claims were presented neglected to deliver such proof of claims to the referee, within the year, should the claimants be deprived of their right to have claims allowed, according to the provisions of the act? Unquestionably not. The neglect of the clerk could not be imputed to them, and our contention is that claims may

also be delivered to the trustee, to be by him transmitted to the referee.

In the case of *In re* Woolf, 4 Am. Bk. Rep., 74, the court said:

> "It is not doubted that where an order has been actually made and through inadvertence of the clerk not entered at the proper time, the court may, in furtherance of justice, direct that the entry be made as of the date when it should have been entered; but the court is not vested with authority to make an order *nunc pro tunc*, except when the delay in making such order has resulted from some act of its own. In the language of the Supreme Court:
>
> "'Where the delay in rendering a judgment or a decree arises from the act of the court—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively as of a time when it should or might have been entered up.' Michell *vs.* Overman, 103 U. S., 64; Gray *vs.* Brignandells, 1 Wall., 627."

"The trustee is an officer of the court." Loveland on Bankruptcy (1st ed.), Sec. 144.

McLean *vs.* Mays, 7 Am. B'kcy Rep., 115.

In re Ryan and Griffin, 6 Nat. B'k Reg., 225.

The office of trustee is created by the act (Sec. 33); and while the trustee is named by the creditors, his ap-

pointment is subject to the approval or disapproval by the referee or by the judge, and he is removable by the judge only. (Gen. Order 13.) His duties are specifically prescribed by General Order 17, which, among other things, provides that in case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge why he should not be removed from office. All accounts of trustees are referred, as of course, to the referee.

The last sentence of General Order 21 provides that: "Proof of debt received by any trustee shall be delivered to the referee to whom the case is referred."

Thus, the Supreme Court has made it the specific duty of the trustee to deliver to the referee all proofs of claims delivered to him and has, therefore, designated the trustee as a proper depositary for such proofs.

The trustee, being an officer of the court, his acts may well be said to be the acts of the court itself, and by filing a claim with him, it can very properly be said that the claim is filed in the court where the proceedings are pending as required by Sec. 57c of the Act.

But, it is said, this court had no power to impose such a duty uponthe trustee. This we deny.

> "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

By the terms of this provision the Supreme Court has

undertaken to prescribe a specific duty of the trustee, the duty of delivering to the referee all proof of claims delivered to him; and by necessary implication, to designate the trustee as a third depositary for such proofs.

Section 30 of the act of July 1, 1898, provides:

> "All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

This section of the Bankruptcy Act recognizes that great embarrassment would arise if it were attempted to carry into effect the act without fixing officers' duties more fully than they are therein prescribed.

The court has assumed under this general authority that it has the power to prescribe the duties of officers, in addition to those prescribed by the act, and has accordingly prescribed many such duties, as witness: General Orders, I, II, III, XII, XVII, XXIV, XXVI, and others. Section 51 of the act prescribes "duties of clerks." Other duties of clerks are prescribed by General Orders I, II and III.

Section 39 prescribes "duties of referee." Other duties of referees are prescribed by General Orders XII, XXIV and XXVI.

Section 57 of the act prescribes "duties of trustees." Other duties of trustees are prescribed by General Order XVII.

The provisions of General Order XXI (1) above referred to, stand on the same basis as the General Orders last referred to, and as far as these petitioners are con-

cerned it merely adopts a mode of procedure, in addition to those provided for in the act, which they may follow in order to have their claims reach the referee for allowance. The basis of the respondents' contention seems to be that the act having designated a form of procedure, in bringing their proof of claims to the referee, such form cannot be changed. They seem to overlook the settled rule of law that no one has a vested right in a specific mode of procedure, and so long as a different mode of procedure does not operate to impair existing rights it cannot be objected to.

That the petitioners had the right to file their claim within a year after adjudication cannot be doubted That they presented such proof of claims seasonably to the trustee with instructions to file them with the referee is admitted. That the trustee failed to carry out the duty imposed upon him by General Order XXI (1) is also shown.

In this connection it is well to call the court's attention to the language of Section 57c of the act, wherein it is provided that "claims after being proved *may*, for the purpose of allowance, be filed" in court or with the referee. While General Order XXI (1) provides that "Proof of debt received by any trustee *shall* be delivered to the referee," the language of Section 57c is not mandatory, but permissive only. It does not say that proof of claim "*shall*" be filed with the court or referee and nowhere else. Taken in connection with General Order XXI (1), which is mandatory in regard to the duty of the trustee as to the disposition of claims deposited with

him, we have a third depository for the procedure which claimants may adopt, and a mandatory duty imposed upon the third depository (the trustee) to present the proof of claims so left with him with the referee, in order that they may be allowed, and to prevent the very hardship which is now attempted to be enforced against them. It is quite true that the Supreme Court is not the legislative but the judicial unit of our tripartite form of Government, but neither can it be doubted that it has the power of enacting and enforcing rules of court for the restriction and benefit of those practicing therein. The power was conferred upon the Supreme Court in bankruptcy matters to prescribe "all necessary rules, form and orders as to procedure and for carrying the act into effect." (Sec. 30, Bankruptcy Act.) The only limitation upon this power is that the rules shall not be inconsistent with the act. Within that limit the rules have the force of positive law. As was said in the case of *In re* Scott, 3 Am. B. R., 625:

> "The general orders and rules promulgated by the Supreme Court in accordance with the statute (Section 30) are obligatory and binding upon the courts of bankruptcy. They confer rights as well as prescribe rules of practice."

The last sentence of General Order XXI (1) is not in derogation of Section 57c of the act, which provides that claims after being proved *may*, for the purpose of allowance, be filed by the claimants in the court or before the referee.

Upon examination of Section 57 of the act it will be

found that throughout all its subdivisions the words "shall" and "may" are used discriminately, the word "shall" being used in each case where the provision is mandatory. Moreover it is the cardinal rule of legal interpretation that the word *may* is not mandatory but is permissive only unless used when conferring power on public officers or bodies for public purposes, in which sense it unquestionably is not used in Section 57.

General Order XXI (1) is not inconsistent with Section 57 of the act but merely supplementary to the act, and since it relates merely to procedure would insure and not prevent compliance with the act.

The last sentence of General Order XXI (1) relating to matters of procedure and not being inconsistent with, but supplementary to, the act, is both as to the duties prescribed and to the procedure sanctioned well within the power of the Supreme Court of the United States, both inherently and as authorized by the Bankruptcy Act.

The Supreme Court having adopted that construction and prescribed such duty and procedure, who will gainsay it?

In the courts below counsel attempted to account for the existence of the final sentence of General Order XXI (1) as a survival of the general orders under the former Bankruptcy Act, to which it was pertinent, and suggests that it has, through carelessness, crept into the present rules, where it has no proper place. His surmise is interesting, it may or may not be true. It must, however, be assumed that the Supreme Court formulated the pres-

ent rule and used all its language deliberately and for a definite purpose. What that purpose may have been is probably immaterial, but may not be difficult to surmise. The court found broad general provisions in the act that claims might be filed with the court or referee, and that they must be filed (assuming that "proved" in Section 57n means "filed") within a fixed time. The act also provided for another officer, the trustee, with whom creditors would naturally come into more intimate relations than with either court or referee, and to whom it might be more convenient to deliver their proofs. In view of these facts the Supreme Court may well have considered that it would conduce to the convenience of creditors and upon the whole to the prompt and certain presentation of claims and, therefore, aid in "carrying the act into force and effect," to permit proofs to be handed to the trustee, taking care, however, to direct the trustee to transmit them to the referee.

The referee dwells upon the contention that "if any duty was imposed upon the trustee by General Order XXI (1), the trustee is at fault and the remedy of the petitioners is upon his bond."

Assuming that General Order XXI (1) did impose a duty upon the trustee, it is not clear that an action would lie upon the trustee's bond, which was given to ensure "the faithful performance of all his official duties as such trustee."

There may be a grave question whether a trustee, whose duty it is to transmit a paper to a specified person or place, does not faithfully perform such duty when he

in good faith entrusts the paper for transmission to a messenger upon whom he has a right to rely, as he certainly ought to have upon his official attorney.

Again, assuming that the trustee has failed to perform a duty imposed upon him, and the consequences of such failure may be relieved against by the court without imperiling the right of any creditor to his ratable share of assets as prescribed by the Bankruptcy Act, must not recourse be had to this remedy, rather than to the official bond of the trustee; and would this not be a complete defense to an action upon the bond?

Perhaps the most complete answer to the proposition of the referee above quoted is suggested by the word "if." "If any duty was imposed," &c.

The premise is hypothetical. In fact, the referee finds that no duty was imposed and, therefore, that there is no remedy against the trustee on his bond. But assuming that it is doubtful, should the petitioning creditors be put to the hazard of the doubt?

Should they be compelled to seek a doubtful remedy against the trustee on his bond, when this Court can grant them sure relief, without infringing on the rights of any one?

The referee does not go the length of denying equitable standing, but says instead, referring to General Order XXI (1): "If it does not impose a duty, creditors cannot rely upon it, since they were not justified in depending on mere volunteer action."

But how were the petitioners to know that the trustee, in taking their proofs, was a mere volunteer? The

Supreme Court has announced that he was not. Are laymen to be charged with greater wisdom than the court?

The referee does not deny the equity, but seems to think the court has no power to do equity in this particular case; that the unfortunate petitioners have no remedy, except such as may exist against a mere gratuitous bailee, for his negligence, and as the referee truly intimates, if that bailee be a mere volunteer, the prospect of recovery would be slim indeed.

It is submitted that the referee is wrong in his conclusion that even if the petitioners have no legal standing, the court has no power to and should give them no equitable relief. The petitioners should not be put to the hazard of an action on the trustee's bond, which, upon the contention of counsel and referee, would be fruitless, or of an action for damages against either the trustee or attorney, as bailee, the issue of which would be at least doubtful.

The fund is in court. No reason exists why every honest creditor should not be allowed to participate in it, except the statutory prohibition, and that, it is conceded, may in a proper case be relaxed.

It is submitted that this is a proper case.

POINT III.

But assume that the Supreme Court has mistaken the limitation of its power; and that the last sentence of G. O. XXI-1 is invalid; upon general principles of equity the order of the District Judge should be sustained.

The District Judge says rightly that "the equities are certainly with the creditor, and if possible his contention should be maintained."

Even the referee concedes that "the arguments appeal very stongly to the sense of justice."

This proposition seems too plain for argument, despite the claim of counsel that "if there was no duty imposed (upon the trustee or his attorney) then the creditors have done nothing to entitle them to any consideration, even from an equitable standing." They have equities quite outside the act or orders, or the duties thereby imposed upon officers or upon themselves. They have, so far as now appears, or as there has so far been occasion to consider, honest claims in amount nearly one-half the total indebtedness of the bankrupt estate. They ask nothing except to be permitted to receive their share of the assets; they seek to deprive other creditors of nothing to which they are justly entitled. This alone gives them equitable standing.

Counsel for appellants mistake the purpose of the Bankruptcy Act when they assume that it is devised for the exclusive benefit of diligent creditors. That is the purpose of judgment and execution, of sundry pro-

visional remedies, and has been an important feature of various State insolvency and general assignment laws. But to shut out creditors is contrary to the fundamental principles of the Bankruptcy Act, to wit, the ratable distribution of all the assets in payment of all the liabilities.

But these claimants have not been negligent. This is true even within the contemplation of the Bankruptcy Act. They verified their claims promptly, and seasonably attempted to start the proofs on the way toward allowance. Even though they believed the proofs must come to the hands of the referee within the year, they were not negligent. Even if the trustee and his attorney are regarded as messengers, it was not negligent for the claimants to entrust the proofs to their care. Business men cannot attend personally to every detail of their affairs. Mails and messengers must be employed and must be trusted.

The equitable standing of the respondents being established, is it still impossible to relieve them.

Aside from the power inherent in the court to afford equitable relief in appropriate cases, it has been frequently decided that such relief may be granted even where a date fixed by the Bankruptcy Act has lapsed.

In Matter of Towne, 10 Am. B. R., 284, it appeared that the creditor was misled by the omission of assets from the schedule prepared by the bankrupt, and so did not even verify his claim within the year. The referee refused to receive the proof, but was reversed by the district judge.

In re Wolff, 4 Am. B. R., 74, it was held that where performance of an act, required by statute to be done within a specified time, was by default of the court delayed beyond that time, relief might be granted.

See, also, Hutchinson *vs.* Otis, 190 U. S., 552, cited in Point I.

Among the particulars in which the Towne case, above cited, differs from the one at bar, is that the petitioner there sought to come in for payment only after other creditors should have been paid in full. For aught that appears that was all the relief needed. Such relief would not avail here, and more is sought and granted. This distinction, however, renders the case cited none the less applicable to illustrate the proposition that the court has power to grant equitable relief, appropriate, of course, to given circumstances.

Upon the hypothesis stated at the beginning of this point (Point III), namely, that the Supreme Court of the United States had no power to authorize the delivery of claims to the trustee, we submit that:—

The Supreme Court has promulgated a general order, under the supposed sanction of the statute, which both statute and order the public are presumed to know and obey, and creditors of a bankrupt, in reliance thereon, have delivered their claims to the trustee, only to discover after the year has elapsed, that the order upon which they relied was void.

The claimants had a right to believe they had performed their full duty in the premises when their proofs were placed in the trustee's hands.

If not, the last sentence of General Order XXI (1) is a snare. By it the Supreme Court of the United States says to the creditors:

> "You may file your proofs directly with court or referee, as the act provides, or, if more convenient to you, may deliver them to the trustee, relying upon our direction, hereby given to him, to transmit them to the referee."

It fails to add, as to the latter alternative: "But you do so at your peril."

There can be no clearer case of a court misleading a creditor to his injury. It is quite as strong as those of Towne and Wolff, above cited, and other cases in which great latitude has been allowed in furtherance of equity.

The referee says: "It was not misapprehension, but was carelessness which produced the trouble." And again, referring to the final sentence of General Order XXI (1): "Its existence is certainly unfortunate, and particularly to the petitioners, if their present plight is attributable to it. That, however, seems not to be at all the case, the proximate cause being mere carelessness, although not imputable to them."

The referee totally ignores the familiar rule that when an injury is attributable to two causes, without either of which it would not have happened, both are to be regarded as proximate causes.

It may be conceded that but for carelessness in the office of the attorney for the trustee, the referee would have received the proofs within the year. But if they had not been first delivered to the trustee such careless-

ness would not have become operative. And it must be assumed that but for the implied permission contained in General Order XXI (1) the proofs would never have been delivered to the trustee, but would have been filed directly with the referee within the year. The existence of the rule was as much a proximate cause of the default as was the negligence in the attorney's office.

In the Muskoka Lumber Co. case, 11 Am. B., R. 761, referred to by counsel before the Circuit Court of Appeals with expression of surprise that the district judge could have distinguished the two cases, no claim had been presented to any officer, or even verified, within the year; so that neither act nor rule had been complied with.

The only ground upon which the claim could have been received was that of equity; and that presented no very strong appeal to the discretion of the court; for the claim was not scheduled, and, therefore, would not be affected by the discharge of the bankrupt.

The Seff Case.

The case, "In the Matter of Abraham Seff," is not only an authority here, but is the only case, besides the one at bar, in which the precise questions here presented appear to have been considered.

As that case, decided by the district judge of the Southern District of New York in December, 1902, is unreported, and, in fact, no opinion appears to have been written, a certified copy of the record is appended hereto.

In that case the circumstances were, in all important particulars, identical with those at bar; indeed, the case of the present petitioners is in one respect stronger than in the Seff case, since a question arose there as to whether the proof had in fact been delivered within the year to the trustee.

In that case, as in this, the proof had been (so the court decided) delivered seasonably to the trustee, who failed to file it with the referee. In that case, as in this, the creditor offered the proof to the referee after the expiration of the year. In that case, as in this, the referee declined to accept it, alleging lack of power as the reason for his action, and the district judge reversed him.

In the Seff case, it does not appear that objection was made before the district judge. But the same was true as to the referee; still he denied the relief sought, and the presumption is that the district judge would also have denied it, if he had thought proper, even though no creditor objected.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

APPENDIX.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 4th day of May, in the year of our Lord one thousand nine hundred and four, and of the independence of the said United States, the one hundred and twenty-eighth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter of Abraham Seff, Bankrupt. }

You will please take notice that we shall move this court, at a term thereof to be held in Room 16, Post-office building, in the city of New York, on the 5th

day of December, 1902, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for a decision upon the annexed question certified to this honorable Court by Peter B. Olney, Esq., Referee in Bankruptcy, to whom the above-entitled matter was referred.

Dated December 10, 1902.

Yours, etc.,

WILMER & CANFIELD,
Attys. for the Bradstreet Co.

No. 49 Wall Street, Manhattan, New York City.

To Messrs. Stern, Singer & Barr,
Attorneys for the Trustee,
No. 309 Broadway, New York City.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter of Abraham Seff, Bankrupt. } In Bankruptcy.

I, Peter B. Olney, one of the referees in said court in Bankruptcy, do hereby certify that in the course of proceedings in said cause before me the following questions arose pertinent to the said proceeding:

On or about the 4th day of November, 1901, one Abraham Seff was duly adjudged a bankrupt by the District Court of the United States for the Southern

District of New York, and at the said time said Seff was indebted to the Bradstreet Company in the sum of fifty ($50.00) dollars, as appears by proof of claim hereto annexed. That on the 23d day of October, 1902, the Bradstreet Company sent said claim to the trustee of said estate, Louis Goetting, Esq., care of Messrs. Stern, Singer & Barr, the trustee's attorneys, No. 309 Broadway, New York city. Said claim was returned by said Goetting or his attorneys with a statement that it should have been filed with the Referee in Bankruptcy, and that a filing fee of one dollar should have been paid therefor, and on the 7th day of November, 1902, said claim was sent to me as referee, No. 68 William street, together with the filing fee of one dollar, but I returned the said claim and filing fee on the ground that it had not been filed within one year after the adjudication in bankruptcy.

The trustee's office is not at No. 309 Broadway, but is at No. 78 Leonard street, New York city. No. 309 Broadway is the address of the attorneys for the trustee, Messrs. Stern, Singer & Barr, who received the claim and returned it to the Bradstreet company prior to the expiration of the year subsequent to the adjudication. It is claimed by the Bradstreet company as shown in the annexed affidavit, that the claim was filed with the trustee prior to the end of the first year after the adjudication of bankruptcy. Under the last part of Section 21 of the General Rule in Bankruptcy, it is provided as follows: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

It is further claimed by the Bradstreet Company that mailing the proof of claim of Louis Goetting, Esq., care of Messrs. Stern, Singer & Barr, his attorneys, No. 309 Broadway, was in fact filing the claim with the trustee. I, the referee, find that I have not the power to allow and file the claim, and I so order.

And the question is certified to the judge for his opinion thereon.

Dated New York City, New York, the day of November, A. D., 1902.

PETER B. OLNEY,
Referee in Bankruptcy.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter
of
Abraham Seff, Bankrupt.

On reading and filing the notice of motion dated December 10, 1902, with the admission of Stern, Singer & Barr, attorneys for the trustee herein thereon; and the question relating to the filing of the proof of claim of the Bradstreet Company, certified to this court for its decision thereon, by Peter B. Olney, Esq., one of the Referees in Bankruptcy to whom the above-entitled matter was referred.

Now, on motion of Wilmer & Canfield, attorneys for the Bradstreet Company, the moving creditor herein, it is

Ordered, That the proof of claim of the Bradstreet Company be received and filed as of the date when delivered to the trustee.

Dated December 18th, 1902.

GEO. B. ADAMS,
U. S. D. J.

The claim will be received as of the date when delivered to the trustee.

G. B. A.

FILE COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

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JAMES H. McKENN

No. 1100

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY and CHARLES DUNCAN, Trustee, in the Matter of Ingalls Brothers, Bankrupts, Petitioners,

116

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY, et al., Respondents.

Brief for Respondent, Charles H. Green, in opposition to Motion for Writ of Certiorari.

HERBERT D. BAILEY,
Counsel for Respondent Green,
Troy, N. Y.

William Boyd, Court Printer, 27 Columbia Street, Albany, N. Y.

William Boyd, Court Printer, 27 Columbia Street, Albany, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. ....

J. B. Orcutt Company, Charles Duncan, Charles H Dauchy Company and Charles Duncan, Trustee in the Matter of Ingalls Brothers, Bankrupts, Petitioners,

vs.

Charles H. Green and the Fullerton-Powell Hardwood Lumber Company, et al., Respondents.

RESPONDENT'S POINTS.

I.

THIS IS NOT A CASE WHERE THE WRIT OF CERTIORARI MAY BE GRANTED.

II.

THIS MATTER IS NOT OF A CHARACTER OR IMPORTANCE WARRANTING THE INTERVENTION OF THIS COURT.

III.

"PROVED" AS USED IN 57n CONTEMPLATES AND INCLUDES FILING.

IV.

THE TRUSTEE HAS NO DUTY TO PERFORM IN RESPECT TO THE FILING OF CLAIMS.

POINTS.

I.

This is not a case where the writ of certiorari may be granted.

The decision of the referee, affirmed by the Circuit Court of Appeals, Second Circuit, was in fact and in effect a disallowance of claims of the petitioners against the bankrupt estate, exceeding $2,000.00.

The reason for the disallowance was the failure of the petitioners to seasonably file and present their claims.

The fact that the decision was in effect a disallowance seems to be asserted by the petitioners on their brief, page three (3), and everywhere conceded. That such is the effect of the decision is recognized.

In re Leibowitz, 6 Am. B. R. 268.

On page 269, the court says, in a similar case:

"The referee was right in rejecting their claims be-
"cause they were not filed within one year after
"the adjudication."

The right of appeal is, in such case as this, expressly given by the Bankruptcy Act, sec. 25b, 1, 2.

"b. From any final decision of a court of appeals, al-
"lowing or rejecting a claim under this act, an appeal
"may be had under such rules and within such time as
"may be prescribed by the Supreme Court of the United
"States, in the following cases and no others:
"1. Where the amount in controversy exceeds the
"sum of two thousand dollars, and the question in-

"volved is one which might have been taken on appeal
"or writ of error from the highest court of a State to
"the Supreme Court of the United States; or
"2. Where some justice of the Supreme Court of the
"United States shall certify that in his opinion the de-
"termination of the question or questions involved in
"the allowance or rejection of such claim is essential to
"a uniform construction of this act throughout the
"United States."

As the right of appeal existed by the direct terms of the act, the determination of the Circuit Court of Appeals was not final, hence the remedy by writ of certiorari is not available to the petitioners.

Act of Congress approved March 3, 1891 (26 Stat. p. 828, tit. 13, sec. 6), limits the right to certiorari to those cases wherein the Circuit Court of Appeals is final.

In re Tampa Suburban R. Co., 168 U. S. 583, the court says:

"When sought, as between private persons, the gen-
"eral rule is that the writ of certiorari, . . . will be
"granted or denied, in the sound discretion of the court,
"on special cause shown, and will be refused where
"there is a plain and equally adequate remedy by ap-
"peal or otherwise."

II.

This matter is not of a character or importance warranting the intervention of this court.

It involves the allowance of claims aggregating about $8,000, and the "construction," if that term may be used, of a section of the Bankruptcy Act (57n), which is very plain and unequivocal in its terms, and which has not been, in the view suggested by counsel in the case at bar, questioned by any decision save in one inferior court, the District Court for the Southern District of New York, in the matter of Seff, an unreported uncontested case, which was virtually by consent of parties, and which was overruled by the Appellate Court of that department in the case at bar. This would not warrant the claim of counsel that the decision of this court is requisite "in order to obtain a uniformity of "construction by the courts." (Petition, Fol. 32.)

Counsel's own admission that they can find no contradecision, in point (Petition, Fol. 33; Brief, page 2) other than the overruled and unreported Seff case, concedes the present uniformity of the practice and decisions.

The case is not one that should be brought into this court.

Ex parte Lanowbew, 141 U. S. 583.

Speaking of the application of the above-mentioned act of March 3, 1891, in a case where there is no appeal, this court says:

"It is evident that it is solely questions of gravity "and importance that the circuit courts of appeal to

"certify to us for instruction; and that it is only when "such questions are involved that the power of this "court to require a case in which the judgment and de- "cree of the court of appeals is made final, to be certi- "fied, can be properly invoked."

In that case, in granting the writ, the court says:

"While therefore, this branch of our jurisdiction "should be exercised sparingly and with great caution, "we are of opinion that the grounds of this application "are sufficient to call for our interposition."

Am. Construct. Co. v. Jacksonville T. & K. W. Ry. Co., 148 U. S. 372.

If the "filing" is not, as counsel argue in one part of their brief, under Point I, an element included in "proved" as used in 57n, essential to the allowance of this claim, then it is a matter of small importance, and the action of the courts in refusing "filing" forms no obstacles to the allowance of petitioners' claim and their participation in the dividends.

In that view, this matter is not of importance and should not be brought to this court.

Counsel must take one position or the other; either "filing" is included in the construction of "proved" in 57n, in which event, the decision herein is a disallowance of a claim, and hence appealable and therefore not a subject of certiorari; or "filing" is not comprehended in the sense in which "proved" is used in 57n, and hence the petitioners are not affected by the decision, as they are not thereby precluded from proving their claims.

III.

"Proved," as used in 57n, contemplates and includes filing.

We must concede that "proof" is very clearly defined in the act. It is also very clear that "proof" is used in the act to designate the same thing for which "deposition" is, perhaps, more appropriately used in the general orders. (XXI.)

"Proof" is one thing; "Proved" is another thing.

"Proof" is the deposition, the verified claim; it is the instrument by which the claim is "proved."

To "prove" a claim against a bankrupt estate involves something more than verifying the deposition.

It involves action. It suggests a subject, an actor. It suggests an object against which the attack is directed. It suggests the attack; but there can be no attack until you come into the forum, and in sight of the object. In a referred case, like this, that forum is before the referee.

It is held that a proper proof of claim when presented and filed, *prima facie*, proves a claim, and the claimant, in case of a contest, has nothing more to do until the objecting party shall have put in some evidence to shake the *prima facie* case. Can there be any question that presentation and filing of the proof is an integral part of the process of "proving?"

Could it be said that a *prima facie* case was established when the "proof" had never been presented to the referee?

The suggestion that a claim is to be considered as "proved," when you have duly verified the "proof," or deposition and put it back in your pocket, or when you have put it anywhere, except before the referee, seems utterly fallacious.

"Prove" is defined, "To cause to be formally and "legally recognized as authentic and valid."

"Proof" is defined as "Anything to convince the "mind of the truth or falsity of a fact or proposition."

But does it even become "proof" until presented to the mind upon which it is intended to act?

The whole theory of presentation of claims involves, as an integral part thereof, the filing of the proof with the referee.

Such filing is by a necessary implication, which one cannot escape, a part of the *proving* of a claim.

General Order XXI (1), speaks of a *deposition* to prove "claims, etc." This deposition is used as synonymous with "proof" of debt. To be exact, that "*depo-*"*sition*" becomes "proof" when it comes regularly before the proper tribunal.

In the last two lines of the order we refer to (1) "Proofs of debt received by any trustee shall be deliv-"ered to the referee to whom the cause is referred." Here, there can be no doubt, "proof" is used in the sense of "deposition," mentioned earlier in the order. Under same rule, section 3, reference is made to *filing* with the referee, "upon the filing of satisfactory proof "of the assignment of a claim proved and entered on the "referee's docket," etc.

Shall we not infer from this that before a claim is "proved" it must have come before the *referee?*

The same order (6) says:

"When the trustee or any creditor shall desire the "re-examination of any claim filed against the bank-"rupt's estate, he may apply by petition to the referee," etc.

Does not this declare a single purpose of having the claim filed with the *referee?*

General Order XXIV says:

"The *referee* shall forthwith transmit to the clerk a "list of the claims proved against an estate."

Does not this imply their getting into court by filing with the referee?

General Order 2 says:

" . . . referee shall indorse on each paper filed "with him," etc.

General Order 20 says:

"Proofs of claims or other papers filed subsequent to "the reference, . . . may be filed either with the "referee or with the clerk."

This, by necessary implication, precludes filing elsewhere. See, also, Rules XV and XXIV, of Northern District.

Rule XV:

"General Order No. XXIV shall not be construed to "require the referee to transmit to the clerk a separate "statement of each proof of debt, but only that he shall "transmit a list of the claims proved after he has reason "to believe that all the claims have been proved against "the estate that will be presented."

Rule XXIV:

"In cases which show no assets the referee need not "formally approve or disallow any claims filed with "him, . . ."

The Act, 57b, says, of a claim on a written instrument, that "such instrument . . . shall be filed with "the proof of claim." Does not this imply a filing of the "proof" with the referee?

57c says: "Claims after being proved may, for the "purpose of allowance, be filed . . . before the "referee, if the case has been referred." This tells where claims are to be *filed.*

57d. "Claims which have been duly proved shall be "allowed, upon receipt by or upon presentation of the "court, unless, etc."

57n. "*Claims shall not be proved against a bankrupt "estate subsequent to one year after the adjudication.*"

In this section "proved" involves both steps of proof, i. e., deposition and filing.

The Act 2 (2), Speaking of jurisdiction of the court, "Allow claims, disallow claims, etc."

The Act 7 (3), of duties of bankrupt. "Examine the correctness of all proofs of claims filed against his estate."

Does not this contemplate the filing of claims before allowance?

The Act 40 (a), Of fees of referee, he is allowed, "twenty-five cents for every proof of claim filed for "allowance."

Does not this indicate the purpose of the law as to place of filing?

The Act 55 (b), "At the first meeting of creditors "the . . . referee shall preside, and before proceed-

" ing with the business, may allow or disallow the claims " of creditors there presented, etc."

Does not this contemplate the filing of the deposition or " proof " with the referee?

See, also, 55, d and e, both of which seem, by a very necessary implication, to contemplate filing of the claims.

The Act 56 (a) specifies creditors whose claims have been allowed, and this, plainly, presupposes filing.

The Act, 63 (a). " Debts of the bankrupt may be " proved and allowed against his estate, etc."

This certainly contemplates presentation or filing.

Matter of Prindle Pump Co., 10 Am. B. R. 405.

At page 407, says of 57n, that it " is more than a " limitation, that it is prohibitory and that the court has " no power or discretion to extend it. . . ."

At page 411, " the proof filed was too late."

In this case the Court says it has no discretion. It cannot consider the hardship imposed. It must follow the law.

In re Brown, 10 Am. B. R. 588.

This case clearly holds filing to be a part of the proving. " The officers of the court cannot know what " amount should be paid to a creditor, or, indeed, who " are creditors, except upon proofs of their claims in the " time and manner provided by law. . . ."

Says of 57n, " The language of the statute permits " no exceptions of its terms. . . ."

" No langauge could be more explicit, and no court " can doubt as to its meaning."

In re Thompson, 10 Am. B. R. 581.

Claim seasonably filed, withdrawal, new claim not an amendment filed after year, not allowed. (C. A., 3rd Cir.)

In re Mercur, 10 Am. B. R. 505.

You can " amend "—only when there is something shown on the record to amend.

In re Lane, 11 Am. B. R. 136.

In case of composition a claim offered for proof after the year cannot be allowed.

In re Hornstein, 10 Am. B. R. 308.

The court while dealing with " provable " vs. " allowable " does not at all deal with or consider " proved " as used in 57n.

In re Towne, 10 Am. B. R. 284.

Where, for fraud of the bankrupt, the filing of proof of claim after the year was allowed, the objector was the bankrupt, not a creditor. See page 287.

All seasonable creditors are to be paid *in full* before the late creditors can come in.

Apply that rule here and we will not object.

In re Leibowitz, 6 Am. B. R. 268.

At page 269, " Sec. 57n of the Act is controlling as " to the *time within which claims must be presented for* " *proof,* and claimants not having brought themselves " within the *time limit there prescribed must fail.* The " referee was right in rejecting their claims, because

" they were *not filed* within *one year after* the adjudica-
" tion in bankruptcy."

This would seem to settle by adjudication the very question presented at this bar.

The word " proved " in 57n is here clearly defined to be something more than swearing to a deposition. It includes filing with the referee and application for allowance.

Bray v. Cobb, 3 Am. B. R. 788.

At page 794, speaking of a claim: " If not presented " within a year, it cannot be proved or allowed."

Collier, 4th Ed., p. 394.

" Claims cannot be filed in bankruptcy after one year " after the adjudication."

In re Hawk, 8 Am. B. R. 71,

Holds that there is no jurisdiction in the court to bring in or let in a creditor after the year, who falls not within the exception contained in 57n.

Matter of Pain, 11 Am. B. R. 351, at page 357, the court says, in speaking of 57n:

" The language of the clause is plain and unequivocal. " There is no ambiguity about it and it admits of no " construction. The decisions are equally clear to the " effect that no proof of debt can be made after the ex- " piration of one year after the adjudication except in " those instances where the period is extended by the act " to not exceeding one year and six months."

In re McCollum, 11 Am. B. R. 447.

In re Muskoka Lumber Co., 11 Am. B. R. 761, *it is held that a creditor who has received no notice and*

knew nothing of the bankruptcy adjudication is, nevertheless, barred by the year limit, and cannot prove his claim.

It is difficult to understand how this decision is to be reconciled with the one at bar by the same judge, here deciding that the creditors who had notice, and by the negligence of their agents, which is imputable to them, failed to get their claim in within the year.

We find in this case nothing to warrant the statement made by counsel, that this claim was not scheduled.

The argument of counsel may be ingenious, but it is hardly ingenuous.

It ignores the effect of the context, the construction and use, upon the sense of the word "proved" as used in different sections.

"Proved" as used in 57b, "Claims after being "proved may," etc., has reference solely to the action of the creditor in verifying his "proof" or "deposi-"tion." *The creditor is the sole actor.*

It contemplates no action thereon, as yet, by the Court. "May" in that connection is not fairly open to the construction claimed by counsel on page 12 of brief. The act here points out the manner in which the creditor *may* get his claim properly before the court. It does not seek to compel him to get his claim in. It simply shows the way, and showing no other way, the statute is, in that sense, exclusive. The creditor "may" present his claim or not, as he choose, but if he would have it allowed, he *must* present it, as there provided, i. e., to the court or referee, and to no one else.

"Proved" as used in 57n is more comprehensive than in 57c. *It clearly contemplates the court as an actor.*

It has reference to something in which the court is an actor. And the statute places its prohibition upon the action of the court.

Counsel's construction asks us to understand that Congress has here, in 57n simply prohibited the creditor, in the seclusion of his own office, from signing a "proof" of claim after the expiration of the year, something with which neither Congress nor the court has any concern. Something which would be an unconstitutional infringement of the rights of the American citizen.

It asks us to understand that " proved " here has no reference to the action of the courts, whose power and duties Congress has the right and power to prescribe.

The statement of their proposition seems to illustrate its absurdity and carry with it, its own refutation.

In the case cited by counsel for the petitioners.

Hutchinson v. Oris, 190 U. S. 552.

Permission to file amended " proof " in that case was placed upon the peculiar facts of that case and the contract of the interested parties. It was an amendment, not a new proof. The claim was the same.

The court says:

" The clause relied upon cannot be taken to exclude " amendments."

This cited case is in no wise at variance with the determination in the case at bar.

IV.

The trustee has no duty to perform in respect to the filing of claims.

There is no provision anywhere in the Act for filing claim with anyone save the referee, in referred cases. (We are not here considering filing with clerk.)

The provision for presentation, consideration and allowance of claims to and by the referee are clear and mandatory.

It is made his province and his duty.

Now, in the face of all the mandatory provisions of the law and general orders and district rules; in the face of what, from years of experience, the law is understood to be, can it be held that, by reason of the last sentence of General Order XXI (1), which directs the trustee to deliver any "proofs" to the referee, that a claim can be proved before the trustee as well as before the referee? That is what must be held to sustain the decision here. This is not a question of fact. It is a question of law, a question to be met and decided, without reference to individual hardship.

If such is the law in this case, it must be the law in every case. If delivery to the *trustee* is a sufficient "proving" of a claim, how can a *referee* know when the claims are all proved? If the trustee has these co-ordinate powers what opportunity is there to present seasonable objection to claims?

The mere statement of the logical result of such ruling would seem to be a sufficiently clear demonstration of its absurdity.

Upon the flimsy excuse of an agent's forgetfulness shall the mandate of the law be nullified? Shall it become true that a creditor who has been diligent, who has

complied with the law, can acquire no rights which must be respected?

If the practice heretofore has been correct; if the law means what it says; if we are to be in any manner bound by the decision in 6 Am. B. R. 268, quoted above, all the argument about the hardship to these delaying creditors is irrelevant.

They had their chance; if they missed it, the fault was with them. If the law is thought here to be a hardship that does not give a court power to revise the law. It is for the courts to apply the law, not to create a statute.

The argument of counsel consists mainly of conceits upon the provisions of General Order XXI (1), last sentence.

In so far as it may seem to contemplate a "filing" with the trustee it is confessedly at variance with the act. Need we say more?

The enacting power lies with Congress, not with the Supreme Court. The act must prevail, and where at variance with the act the general orders are not to be considered.

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"But the general orders are not always in tune with "the law; . . . In such cases, the law, of course, "controls; our general orders and forms have not the "effect of law, *much less of the abrogation of law.*"

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This court says of its own rules on page 470: "These "rules were but intended to execute the act, and not to "add to its provisions."

All this talk of these creditors suffering injustice is fallacious.

If there was any duty imposed upon trustee or attorney by this delivery of claims, then there was a default in the execution of a duty, for which they can answer. If there was no duty imposed, then the creditors have done nothing to entitle them to any consideration, even from an equitable standpoint.

Mr. Smith was the agent, voluntary or otherwise, of the petitioners to file these claims.

The rights and remedies available as between the petitioners and their agents are not matters within the cognizance of this court at this time. This proposition, however, is in point, that what the petitioners did or failed to do through their acknowledged agents is imputable here in this court to the petitioners.

There is no suggestion in the record that Mr. Smith or his clerk is not abundantly able to indemnify the petitioners if they have suffered any loss. There is then no ground disclosed by the record, upon which to urge, on behalf of the petitioners, equities that should override the mandatory provisions of the statute.

There is, however, a very strong suggestion running through petition and arguments, that this application is made in the interest and for the benefit of Mr. Smith, who is not a party to the record.

In the absence from the record of any such finding of fact, we cannot presume that petitioners acted at any time in reliance upon General Order XXI (1), and the second efficient cause referred to by counsel, on page 19 of their brief, is eliminated, and the willful or negligent acts and omissions of Mr. Smith and his clerk remain the only efficient factors in the situation.

New findings of fact cannot be made here. Counsel base their argument on the equities of the petitioners

upon the proposition that they delivered their "proofs" to the trustee in reliance upon General Order XXI (1). There is no such finding. There is no suggestion that such was the fact, anywhere, save in the argument of counsel. If petitioners would seek relief on the ground that they were misled by the rule of the court, it was certainly incumbent upon them to aver and prove such fact, which they have not done.

Nor is that argument available to the claim of Mr. Duncan, who is trustee, unless he can comply with petitioners' interpretation of the statute by presenting his claim to himself, which is again an absurdity.

Moreover this application is an entity. It is not made by the petitioners severally, and if it cannot be properly granted as to all, it must fail.

Nor can counsel fairly claim that accident and negligence on the part of Mr. Smith's clerk were the only efficient cause of the non-filing. It is found as a fact (fol. 6, 10th finding), "That said Henry W. Smith for "a time after said claims were so left with him for "filing by the trustee upon his own responsibility de-"layed filing the same with the referee."

The Court is asked to cut down by one-half the dividends of those creditors who have complied with the law. Is there any apparently good reason for doing this?

We may reach a better understanding of the presence of this provision as to trustees in General Order XXI (1), if we look into its history.

The Act of 1898, section 30, reads: "All neces-ary "rules, forms, and orders as to procedure and for carry-"ing this act into force and effect shall be prescribed, "and may be amended from time to time by the Su-"preme Court of the United States."

This is the only authority for the existence of the general orders. *That gives no power to create either new officers or new duties for existing officers.*

We understand that the present general orders are an adaptation from the practice existing under the Act of 1867.

The Act of 1867 provides, in section 22, that proofs of claims should be first presented to the *register,* who after approving the same, was required to send them to the *assignee,* whose duty it was to compare them with the books of the bankrupt, and enter them in a register to be kept by him, *and then* deliver all proofs of claims received by him to the *register.* General Orders 34, under Act of 1867, and the language of the old rule is identical with that of present rule XXI (1), in this respect, only reading "trustee" for "assignee," and "referee" for "register."

Under that Act of 1867, section 10, the justices of the Supreme Court were empowered to frame general orders for the purpose, among other things, for regulating the duties of the various officers; for regulating the filing, custody and inspection of papers, and to consolidate the duties of register, assignee, etc.

By reference to these provisions it is seen that not only were the powers given to the Supreme Court much broader than under the Act of 1898, but the Act of 1867, made a provision for proofs of claims coming into the hands of the assignee, and imposed a duty upon him in reference to the proofs of claim, which the Act of 1898 does not impose.

And the anomalous provisions in reference to the trustee delivering claims to the referee, contained in General Order XXI (1), are now inapplicable remnants of a provision that, under the Act of 1867, was consistent with the duties imposed by that act.

In this connection there is another consideration that is suggested by this application.

Mr. Charles Duncan, as trustee, is one of the petitioners. He is the trustee for the benefit of the creditors. It occurs to us that the proper discharge of his duty to those whose claims have been allowed does not either require or permit him to join in the effort to get in other claims.

No relief has been sought or recovered in any stage of this proceeding against the trustee. We suggest that the trustee has no standing to apply for the writ of certiorari.

The decision of the Circuit Court of Appeals was correct.

This application for a writ of certiorari should be denied.

HERBERT D. BAILEY,
Counsel for Respondent, Charles H. Green.

FILE COPY.

FILED
OCT 1 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

No. 116.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY and CHARLES DUNCAN, Trustee, in the Matter of INGALLS BROTHERS, Bankrupts, Petitioners,

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY, et al., Respondents.

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

No. 400.

J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company and Charles Duncan, Trustee, in the Matter of Ingalls Brothers, Bankrupts, Petitioners,

vs.

Charles H. Green and the Fullerton-Powell Hardwood Lumber Company, et. al., Respondents.

RESPONDENTS' POINTS.

I.

"PROVED" AS USED IN 57N CONTEMPLATES AND INCLUDES FILING.

II

THE TRUSTEE HAS NO DUTY TO PERFORM IN RESPECT TO THE FILING OF CLAIMS.

POINTS.

I.

"Proved," as used in 57n, contemplates and includes filing.

We must concede that "proof" is very clearly defined in the act. It is also very clear that "proof" is used in the act to designate the same thing for which "deposition" is, perhaps, more appropriately used in the general orders. (XXI.)

"Proof" is one thing; "proved" is another thing. "Proof" is the deposition, the verified claim; it is the instrument by which the claim is "proved."

To "prove" a claim against a bankrupt estate involves something more than verifying the deposition.

It involves action. It suggests a subject, an actor. It suggests an object against which the attack is directed. It suggests the attack; but there can be no attack until you come into the forum. In a referred case, like this, that forum is before the referee.

It is held that a proper proof of claim when presented and filed, *prima facie*, proves a claim, and the claimant, in case of a contest, has nothing more to do until the objecting party shall have put in some evidence to shake the *prima facie* case. Can there be any question that presentation and filing of the proof is an integral part of the process of "proving?"

Could it be said that a *prima facie* case was established when the "proof" had never been presented to the referee?

The suggestion that a claim is to be considered as "proved," when you have duly verified the "proof," or deposition, and put it back in your pocket, or when you have put it anywhere, except before the referee, seems utterly fallacious.

"Prove" is defined, "To cause to be formally and "legally recognized as authentic and valid."

"Proof" is defined as "Anything to convince the "mind of the truth or falsity of a fact or proposition."

But does it even become "proof" until presented to the mind upon which it is intended to act?

The whole theory of presentation of claims involves, as an integral part thereof, the filing of the proof with the referee.

Such filing is by a necessary implication, which one cannot escape, a part of the *proving* of a claim.

General Order XXI (1) speaks of a *deposition* to prove "claims, etc." This deposition is used as synonymous with "proof" of debt. To be exact, that "*deposition*" becomes "proof" when it comes regularly before the proper tribunal.

In the last two lines of the order we refer to (1) "proofs of debt received by any trustee shall be deliv-"ered to the referee to whom the cause is referred." Here, there can be no doubt, "proof" is used in the sense of "deposition," mentioned earlier in the order. Under same rule, section 3, reference is made to *filing* with the referee, "upon the filing of satisfactory proof "of the assignment of a claim proved and entered on the "referee's docket," etc.

Shall we not infer from this that before a claim is "proved" it must have come before the *referee*?

The same order (6) says:

"When the trustee or any creditor shall desire the "re-examination of any claim filed against the bank-"rupt's estate, he may apply by petition to the referee," etc.

Does not this declare a single purpose of having the claim filed with the *referee?*

General Order XXIV says:

"The *referee* shall forthwith transmit to the clerk a "list of the claims proved against an estate."

Does not this imply their getting into court by filing with the referee?

General Order 2 says:

" . . . referee shall indorse on each paper filed "with him," etc.

General Order 20 says:

"Proofs of claims or other papers filed subsequent to "the reference, . . . may be filed either with the "referee or with the clerk."

This, by necessary implication, precludes filing elsewhere. See, also, Rules XV and XXIV, of Northern District.

Rule XV:

"General Order No. XXIV shall not be construed to "require the referee to transmit to the clerk a separate "statement of each proof of debt, but only that he shall

" transmit a list of the claims proved after he has reason " to believe that all the claims have been proved against " the estate that will be presented."

Rule XXIV:

" In cases which show no assets the referee need not " formally approve or disallow any claims filed with " him, . . ."

The Act, 57b, says, of a claim on a written instrument, that " such instrument . . . shall be filed with " the proof of claim." Does not this imply a filing of the " proof " with the referee?

57e says: " Claims after being proved may, for the " purpose of allowance, be filed . . . before the " referee, if the case has been referred." This tells where claims are to be *filed*.

57d: " Claims which have been duly proved shall be " allowed, upon receipt by or upon presentation of the " court, unless," etc.

57n: " *Claims shall not be proved against a bankrupt* " *estate subsequent to one year after the adjudication.*"

In this section " proved " involves both steps of proof, i. e., deposition and filing.

The Act 2 (2), speaking of jurisdiction of the court, " allow claims, disallow claims," etc.

The Act 7 (3), of duties of bankrupt: " Examine the " correctness of all proofs of claims filed against his " estate."

Does not this contemplate the filing of claims before allowance?

The Act 40 (a): Of fees of referee, he is allowed "twenty-five cents for every proof of claim filed for "allowance."

Does not this indicate the purpose of the law as to place of filing?

The Act 55 (b): "At the first meeting of creditors "the . . . referee shall preside, and before proceed- "ing with the business, may allow or disallow the claims "of creditors there presented," etc.

Does not this contemplate the filing of the deposition or "proof" with the referee?

See, also, 55, d and e, both of which seem, by a very necessary implication, to contemplate filing of the claims.

The Act 56 (a) specifies creditors whose claims have been allowed, and this, plainly, presupposes filing.

The Act 63 (a): "Debts of the bankrupt may be "proved and allowed against his estate," etc.

This certainly contemplates presentation or filing.

Matter of Pettingill, 14 Am. B. R. 763.

(Syl.) "The word 'proved' in section 57n must be "read to include filing the claim with the referee; con- "sequently no claim can be allowed against a bankrupt "estate unless it has not only been verified but also "filed with the referee within one year after the date "of the adjudication."

Matter of Prindle Pump Co., 10 Am. B. R. 405.

At page 407, says of 57n, that it "is more than a "limitation; that it is prohibitory, and that the court "has no power or discretion to extend it. . . ."

At page 411, "the proof filed was too late."

In this case the court says it has no discretion. It cannot consider the hardship imposed. It must follow the law.

In re Brown, 10 Am. B. R. 588.

This case clearly holds filing to be a part of the proving. "The officers of the court cannot know what "amount should be paid to a creditor, or, indeed, who "are creditors, except upon proofs of their claims in the "time and manner provided by law. . . ."

Says of 57n: "The language of the statute permits "no exceptions of its terms. . . ."

"No language could be more explicit, and no court "can doubt as to its meaning."

In re Thompson, 10 Am. B. R. 581.

Claim seasonably filed, withdrawal, new claim not an amendment filed after year, not allowed. (C. A., 3rd Cir.)

In re Mercur, 10 Am. B. R. 505.

You can "amend"—only when there is something shown on the record to amend.

In re Lane, 11 Am. B. R. 136.

In case of composition a claim offered for proof after the year cannot be allowed.

In re Hornstein, 10 Am. B. R. 308.

The court while dealing with " provable " v. " allowable " does not at all deal with or consider " proved " as used in 57n.

In re Towne, 10 Am. B. R. 284.

Where, for fraud of the bankrupt, the filing of proof of claim after the year was allowed, the objector was the bankrupt, not a creditor. (See page 287.)

All seasonable creditors are to be paid *in full* before the late creditors can come in.

Apply that rule here and we will not object.

In re Leibowitz, 6 Am. B. R. 268.

At page 269, " Sec. 57n of the Act is controlling as " to the *time within which claims must be presented for* " *proof,* and claimants not having brought themselves " within the *time limit there prescribed must fail.* The " referee was right in rejecting their claims, because " they were *not filed* within *one year after* the adjudication in bankruptcy."

This would seem to settle by adjudication the very question presented at this bar.

The word " proved " in 57n is here clearly defined to be something more than swearing to a deposition. It includes filing with the referee and application for allowance.

Bray v. Cobb, 3 Am. B. R. 788.

At page 794, speaking of a claim: " If not presented " within a year, it cannot be proved or allowed."

Collier, 4th ed., p. 394.

" Claims cannot be filed in bankruptcy after one year " after the adjudication."

In re Hawk, 8 Am. B. R. 71:

Holds that there is no jurisdiction in the court to bring in or let in a creditor after the year, who falls not within the exception contained in 57n.

Matter of Pain, 11 Am. B. R. 351, at page 357, the court says, in speaking of 57n:

"The language of the clause is plain and unequivo-
"cal. There is no ambiguity about it and it admits of
"no construction. The decisions are equally clear to
"the effect that no proof of debt can be made after the
"expiration of one year after the adjudication except
"in those instances where the period is extended by the
"act to not exceeding one year and six months."

In re McCollum, 11 Am. B. R. 447.

In re Muskoka Lumber Co., 11 Am. B. R. 761, *it is held that a creditor who has received no notice and knew nothing of the bankruptcy adjudication is, nevertheless, barred by the year limit, and cannot prove his claim.*

It is difficult to understand how this decision is to be reconciled with the one at bar by the same judge, here deciding that the creditors who had notice, and by the negligence of their agents, which is imputable to them, failed to get their claim in within the year.

We find in this case nothing to warrant the statement made by counsel, that this claim was not scheduled.

The argument of counsel may be ingenious, but it is hardly ingenuous.

It ignores the effect of the context, the construction and use, upon the sense of the word "proved" as used in different sections.

"Proved," as used in 57b: "Claims after being
"proved may," etc., has reference solely to the action of the creditor in verifying his "proof" or "deposi-
"tion." *The creditor is the sole actor.*

It contemplates no action thereon, as yet, by the Court. "May" in that connection is not fairly open to the construction claimed by counsel on page 12 of brief. The act here points out the manner in which the creditor *may* get his claim properly before the court. It does not seek to compel him to get his claim in. It simply shows the way, and showing no other way, the statute is, in that sense, exclusive. The creditor "may" present his claim or not, as he choose, but if he would have it allowed, he *must* present it, as there provided, i. e., to the court or referee, and to no one else.

"Proved," as used in 57n, is more comprehensive than in 57c. *It clearly contemplates the court as an actor.* It has reference to something in which the court is an actor. And the statute places its prohibition upon the action of the court.

Counsel's construction asks us to understand that Congress has here, in 57n, simply prohibited the creditor, in the seclusion of his own office, from signing a "proof" of claim after the expiration of the year, something with which neither Congress nor the court has any concern. Something which would be an unconstitutional infringement of the rights of the American citizen.

It asks us to understand that "proved" here has no reference to the action of the courts, whose power and duties Congress has the right and power to prescribe.

The statement of their proposition seems to illustrate its absurdity and carry with it its own refutation.

In the case cited by counsel for the petitioners,

Hutchinson v. Oris, 190 U. S. 552,

Permission to file amended "proof" in that case was placed upon the peculiar facts of that case and the contract of the interested parties. It was an amendment, not a new proof. The claim was the same.

The court says:

"The clause relied upon cannot be taken to exclude "amendments."

This cited case is in no wise at variance with the determination in the case at bar.

With the sole exception of the unreported, and *ex parte* decision in the Seff case, cited by counsel, the decisions of all the courts have thus far been unanimous in their construction of the provisions under consideration here. If the clear, explicit words of the statute are not to be followed, then *certainty* as to time of filing claims must be replaced by *uncertainty;* and the right to file a claim at *anytime* is left to the discretion of the courts, which does not, in our view, accord with the expressed intent of the act.

II.

The trustee has no duty to perform in respect to the filing of claims.

There is no provision anywhere in the act for filing claim with anyone save the referee, in referred cases. (We are not here considering filing with clerk.)

The provision for presentation, consideration and allowance of claims to and by the referee are clear and mandatory.

It is made his province and his duty.

Now, in the face of all the mandatory provisions of the law and general orders and district rules; in the face of what, from years of experience, the law is understood to be, can it be held that, by reason of the last sentence of General Order XXI (1), which directs the

trustee to deliver any "proofs" to the referee, that a claim can be proved before the trustee as well as before the referee? That is what must be held to sustain the decision here. This is not a question of fact. It is a question of law; a question to be met and decided, without reference to individual hardship.

If such is the law in this case, it must be the law in every case. If delivery to the *trustee* is a sufficient "proving" of a claim, how can a *referee* know when the claims are all proved? If the trustee has these co-ordinate powers what opportunity is there to present seasonable objection to claims?

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The enacting power lies with Congress, not with the Supreme Court. The act must prevail, and where at variance with the act the general orders are not to be considered.

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This court says of [illegible] rules, on page 470: "These "rules were but in[illegible] execute the act, and not to "add to its provisions."

This same General Order XXI, clause 6, says: "When the trustee *or any creditor shall* desire the re-"examination of any claims filed, etc., . . . he may "apply by petition . . . and thereupon the referee "*shall make an order,*" etc.

Yet the courts have held that as the statute did *not give the creditor* the right of re-examination, the rule of the general order are ineffectual.

Matter of Lewensohn, 9 Am. B. R. 368.

This court refused to review this decision. See sub nominee.)

Baudendohl v. Bernheimer, April 27, 1903.

All this talk of these creditors suffering injustice is fallacious.

If there was any duty imposed upon trustee or attorney by this delivery of claims, then there was a default in the execution of a duty, for which they can answer. If there was no duty imposed, then the credi-

tors have done nothing to entitle them to any consideration, even from an equitable standpoint.

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New findings of fact cannot be made here. Counsel base their argument on the equities of the petitioners upon the proposition that they delivered their "proofs" to the trustee in reliance upon General Order XXI (1). There is no such finding. There is no suggestion that such was the fact, anywhere, save in the argument of counsel. If petitioners would seek relief on the ground that they were misled by the rule of the court, it was certainly incumbent upon them to aver and prove such fact, which they have not done.

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tors. It occurs to us that the proper discharge of his duty to those whose claims have been allowed does not either require or permit him to join in the effort to get in other claims.

No relief has been sought or recovered in any stage of this proceeding against the trustee. We suggest that the trustee has no standing here.

The decision of the Circuit Court of Appeals was correct and should be affirmed.

HERBERT D. BAILEY,
Counsel for Respondents,
Troy, N. Y.

Supreme Court of the United States.

No 116.—October Term, 1906.

J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company, and Charles Duncan, Trustee, Petitioners,
vs.
Charles H. Green et al.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1907.]

This case comes here upon return to a writ of certiorari, issued by this court to the Circuit Court of Appeals of the Second Circuit. It is a proceeding in bankruptcy, and the question involved is one in regard to the sufficiency of the filing of certain proofs of claims against the bankrupts' estate.

The facts are these: Messrs. Ingalls Brothers were adjudicated bankrupts in proceedings in the District Court of the United States for the Northern District of New York on the 3d day of December, 1902. Soon thereafter one Charles Duncan was appointed trustee, and on the 19th day of December, 1902, he duly verified a proof of claim in his own behalf for $4,171, admitting an offset of $327. On the 1st of April, 1903, the J. B. Orcutt Company duly verified a proof of claim against the bankrupts' estate for $893.68, and in a short time delivered it to the trustee. At the first meeting of creditors Charles H. Dauchy Company presented to the referee a defective proof of claim against said bankrupts for $3,335.67, which was returned by the referee to said company for correction. Prior to January 23, 1903, the Dauchy Company duly verified another proof of claim in the same amount, prepared by Henry W. Smith, the attorney for the trustee, who had volunteered to prepare the same so as to comply with the rules, and on or about March 15, 1903, the Dauchy Company delivered this proof of claim to the trustee. Prior to June 1, 1903, the trustee delivered all three claims to said Henry W. Smith, with directions to file the same with the referee, which the attorney promised to do. In this he failed. When the attorney Smith received these claims from the trustee he handed them to a clerk in his office, directing him to put them with the papers in this proceeding, and shortly after told the clerk to file the proofs of the claim with the referee. The clerk neglected to do so, and some time afterwards, upon being asked in regard to it, said that he would do so immedi ly. This was before the expiration of the year after the adjudicati n. But he again failed to make the filing. The

Dauchy proof, which had been left with the attorney, is lost and can not be found, after diligent search made by the attorney for it in his office. The other two claims, the Orcutt Company and Duncan's own claim, were found in a package of papers relating to another bankruptcy proceeding. Another proof of claim, for the same amount, was made by the Dauchy Company April 2, 1904, and, with the Duncan and Orcutt proofs, was presented to the referee for filing, each proof being accompanied by a petition, dated April 2, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3, 1903, or for such other or further relief as might be just and proper. Smith was not the attorney for any of the claimants, and his failure to file with the referee was not by virtue of any instructions to withhold such claims from filing, nor was it known on the part of any of the claimants that he had failed to file them until more than a year after the adjudication.

Upon the presentation of these claims with the petition, other creditors of the bankrupts objected to the granting of the relief asked in the petition, upon the ground that the claims had not been seasonably presented to the court, and were barred under the provisions of section 57*n* of the Bankruptcy Act.

Upon the hearing of the petition for leave to file these proofs of claim, the referee, to whom the case had been referred, denied the petition, under the objection of other creditors, on the ground that one year having expired subsequent to the adjudication of bankruptcy and prior to the filing of the several petitions and the presentation therewith to the referee, the referee had no power to permit the filing of said proofs of claims, and that neither the referee nor the court had any discretionary power to permit either of said proofs of claims to be filed, either *nunc pro tunc* or otherwise. An order denying the relief asked was duly entered.

The referee then certified for review by the District Court the question, whether his decision was correct in refusing the relief stated by the claimants.

The District Court directed that the claims of the petitioning creditors should be filed as of the date when delivered to the trustee.

Charles H. Green, one of the creditors of the bankrupts, thereupon appealed from the order of the District Court reversing the determination made by the referee, to the United States Circuit Court of Appeals for the Second Circuit, and in his appeal, in view of the position of the trustee and his refusal himself to act in the matter, Green asked that he might be permitted to prosecute the appeal for himself and the other creditors. The District Court thereupon allowed the appeal and cited the respondents to appear in the Circuit Court of Appeals. That court, having heard the case argued, reversed the decision of the District Court, and affirmed that of the referee. A brief memorandum was filed by the court, in which it was stated that the referee had given a very full examination of the question

of law involved, and that the court concurred in his interpretation of the statute, and that his opinion might be printed as a supplement to the memorandum of the court.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The question in this case resolves itself into one of the sufficiency of the presentation of proofs of claims of the creditors named in the foregoing statement. They were, in reality, presented and delivered to the trustee in bankruptcy before the expiration of one year after adjudication, but there was no actual filing of the claims with the referee until after the expiration of that time, when the attempt to file them with the petition was made as above stated.

The question turns upon the construction of some of the subdivisions of the fifty-seventh section of the Bankruptcy Act, together with the twenty-first General Order in Bankruptcy, the last part of which reads: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

Subsection *a* of section 57 provides that "Proofs of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor; and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

Subsection *c* provides that "Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred."

Subsection *d* provides that "Claims which have been duly proved shall be allowed, upon receipt by or presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Subsection *n* provides that "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication."

If the presentation and delivery of these proofs of claim in the case before us with the trustee was sufficient within the meaning of the bankruptcy act, then the referee should have proceeded to determine the question of their allowance, when presented to him, the same as if they had been filed with him personally within the year subsequent to adjudication.

We have been referred to no case in this court deciding the exact question, nor is there cited any case in the lower courts wherein it has been decided, with the exception of that of *In re Seff*, District Court of United States, Southern District of New York, (not reported,) where the question

before us seems to have been directly before that court, and the decision was in favor of the sufficiency of the filing with the trustee. The parties hereto have cited a great many cases in the lower courts deciding questions somewhat analogous to the one now before us, but none in which this question has been decided. We, therefore, think it unnecessary to refer to them.

We are of opinion, taking into consideration the various provisions of the fifty-seventh section of the Bankruptcy Act, in connection with No. 21 of the General Orders in Bankruptcy, adopted by this court, that the presentation and delivery of proofs of claim to the trustee in bankruptcy within the year after the adjudication is a filing within the statute and the general order above mentioned.

The General Orders of this court are provided for by section 30 of the Bankruptcy Act, which enacts that "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Under that section this court had the power to provide, as it has done in Order 21, that "Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred." There is nothing in that provision inconsistent with, or opposed to, anything stated in the bankruptcy law upon the subject, and we must, therefore, take the statute and the order and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself. The question is not whether any one but the court or referee can pass upon a claim and allow it or disallow it. That must be done by the court or referee, but it is simply whether a delivery of a claim, properly proved, to the trustee is a sufficient filing. The law provides, subsection *c* of section 57, that the claims, after being proved, may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee, if the case has been referred; but that does not prohibit their being filed somewhere else prior to their allowance, and the order in bankruptcy in substance provides that they may be filed after being proved, with the trustee. Such order is equivalent to saying that proofs of debt (or claim) may be received by the trustee. When they are so received by him they are in legal effect received by the court, whose officer the trustee is. Having been received by the trustee, under authority of law, the proofs of debt are thereby sufficiently filed so far as the creditors are concerned, and it is the duty of the trustee to deliver them to the referee. If the trustee inadvertently neglects to perform that duty it is the neglect of an officer of the court, and the creditors are in no way responsible therefor. The presentation and filing have been made within the time provided for and with one

of the proper officers, and his failure to deliver to the referee can not be held to be a failure on the part of the creditor to properly file his proofs.

Not much benefit can be derived from an examination of the Bankruptcy Act of 1867, in reference to the provisions therein contained, granting power to the Justices of the Supreme Court to frame general orders for the purpose named. See section 10, Bankruptcy Act of 1867. We think it plain that so far as this matter is concerned the Supreme Court had full power to make the general order it did.

Different considerations, however, apply to the one claim made by the trustee himself. We do not think that in any event a trustee could file with himself his proof of his own claim against the estate of the bankrupt. General principles of law forbid that he should so act in his own case. And his delivery of his own claim to his attorney could not make such delivery stand in the place of a delivery to the referee.

These views lead to a reversal of the order of the Circuit Court of Appeals, and the affirmance of the order made by the District Court, with the modification, refusing the filing of the proof of claim of the trustee himself.

And it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.